No. 04-759

Title:	United States, Petitioner v. Joseph Olson, et al.
Docketed:	December 3, 2004
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(03-15141)
Decision Date:	April 2, 2004
Rehearing Denied:	July 21, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Oct 7 2004	Application (04A280) to extend the time to file a petition for a writ of certiorari from October 19, 2004 to November 18, 2004, submitted to Justice O'Connor.
Oct 7 2004	Application (04A280) granted by Justice O'Connor extending the time to file until November 18, 2004.
Nov 8 2004	Application (04A280) to extend further the time from November 18, 2004 to December 3, 2004, submitted to Justice O'Connor.
Nov 9 2004	Application (04A280) granted by Justice O'Connor extending the time to file until December 3, 2004.
Dec 3 2004	Petition for a writ of certiorari filed. (Response due January 3, 2005)
Dec 22 2004	Order extending time to file response to petition to and including February 2, 2005.
Feb 2 2005	Brief of respondents Joseph Olson, Monica Olson, and Javier Vargas in opposition filed.
Feb 16 2005	DISTRIBUTED for Conference of March 4, 2005.
Feb 17 2005	Reply of petitioner United States filed. (Distributed)
Mar 7 2005	Petition GRANTED.
Apr 18 2005	Extension of time within which to file respondents' brief on the merits to and including June 27, 2005.
Apr 19 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including April 25, 2005.
Apr 25 2005	Joint appendix filed.
Apr 25 2005	Brief of petitioner United States filed.
Jun 21 2005	Extension of time within which to file respondents' brief on the merits to and including July 18, 2005.
Jul 18 2005	Brief of respondents Joseph Olson, Monic Olson, and Javier Vargas filed. (Circulated).
Jul 20 2005	CIRCULATED.

Jul 20 2005	SET FOR ARGUMENT on Wednesday, October 12, 2005.
Jul 29 2005	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Aug 8 2005	Record received from USDC for District of Arizona. (1 box)
Aug 22 2005	Reply of petitioner United States filed. (Distributed)
Oct 12 2005	Argued. For petitioner: Deanne E. Maynard, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For Respondents: Thomas G. Cotter, Tucson, Ariz.

Supreme Court, U.S.
FILED
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

With certain exceptions, the Federal Tort Claims Act waives the sovereign immunity of the United States for specified torts of federal employees acting within the scope of their employment, allowing liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The Act also vests jurisdiction in federal district courts to hear such tort claims, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The question presented is:

Whether the liability of the United States under the Federal Tort Claims Act with respect to safety inspections is the same as that of private individuals under like circumstances or, as the Ninth Circuit held, the same as that of state and municipal entities under like circumstances.

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JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is reported at 362 F.3d 1236. The opinion of the district court (App., *infra*, 8a–31a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. A petition for rehearing was denied on July 21, 2004 (App., *infra*, 34a-35a). On October 7, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 18, 2004, and on November 9, 2004, she

further extended the time to and including December 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are set forth in an appendix to the petition. App., *infra*, 36a-41a.

STATEMENT

This case presents an important question with respect to the extent of the United States' waiver of its sovereign immunity under the Federal Tort Claims Act (FTCA). The text of the FTCA expressly limits that waiver to circumstances in which a "private individual" would be liable. 28 U.S.C. 2674; see also 28 U.S.C. 1346(b). The court of appeals nonetheless looked to state law as it relates to the distinct duties of state governmental entities under state law, rather than the law as it relates to the duties of private persons, in holding that this case falls within the FTCA's waiver of sovereign immunity.

1. a. The FTCA waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment, allowing liability "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. Congress vested the district courts with exclusive jurisdiction to hear such tort claims, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA contains several further exceptions to this limited waiver of sovereign immunity. See 28 U.S.C. 2680(a)-(n).

b. The Federal Mine Safety and Health Amendments Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, establishes a comprehensive scheme designed to promote the health and safety of the Nation's miners and improve working conditions in the Nation's mines. Pursuant to the statute, the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), promulgates health and safety standards for coal mines and other mines. See 30 U.S.C. 811(a). The Mine Act places responsibility for compliance with health and safety regulations upon the mine operator. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"); 30 U.S.C. 801(g)(2) ("[I]t is the purpose of this chapter * * * to require that each operator of a coal or other mine and every miner in such mine comply with such [mandatory health or safety] standards.").

The statute requires MSHA to perform "frequent inspections and investigations in coal or other mines each year" for several purposes. 30 U.S.C. 813(a). The Secretary is required to make inspections of each underground mine "in its entirety at least four times a year." *Ibid.* The statute also provides for "an immediate inspection" by MSHA when a miner or a representative of miners provides a written and signed notice that there are "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." 30 U.S.C. 813(g)(1).

2. a. According to the complaint filed in federal district court, miners Joseph Olson and Javier Vargas were seriously injured in a mining accident at the Mission Underground Mine, a copper mine in Arizona that

is privately owned and operated by Asarco Incorporated. App., *infra*, 9a. Olson, his wife Monica Olson, and Vargas (respondents) sued the United States alleging that it was liable, due to MSHA's negligence, for the miners' injuries. *Id.* at 1a-2a. Respondents' claims for negligence were based on allegations that (1) MSHA Field Office Supervisor James Kirk failed to evaluate and sufficiently act upon six anonymous complaints he received regarding safety hazards at the mine; and (2) MSHA Inspector Alan Varland failed to inspect the mine thoroughly and in its entirety. *Ibid.*

b. The district court granted the government's motion to dismiss respondents' complaint for two independent reasons.[1]

i. The district court held that respondents' allegations failed to state a claim for tort liability under Arizona law. App. 22a-25a. The court noted that the liability of the United States under the FTCA is defined by the liability imposed by state law upon a private person in like circumstances, and that "even if a specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes comparable liability for private persons." *Id.* at 13a (citing *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978)).

The court explained that negligent inspection claims in Arizona are governed by Sections 323 and 324A of the Restatement (Second) of Torts (1965) (Restatement), which set forth the "Good Samaritan" doctrine.

[1] The district court consolidated respondents' case with a suit brought by the family of Jose Villanueva, a miner killed in the same accident. App., *infra*, 8a. The *Villanueva* claims are not at issue in this petition.

That doctrine describes the tort liability of one "who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection" of the other person or a third party. App., *infra*, 23a-24a. Under the Restatement, such a person is liable to another or a third party for his negligence only if "his failure to exercise [reasonable] care increases the risk of [physical] harm," or "the harm is suffered because of reliance of the other or the third person upon the undertaking," or, with respect to injured third parties, "he has undertaken to perform a duty owed by the other to the third person." *Ibid.* (quoting Restatement, *supra*, §§ 323, 324A). Applying those principles, the district court held that respondents could not state a claim under the Good Samaritan doctrine, because respondents alleged "no facts that could support a finding that MSHA's decisions increased the risk of harm to them or that MSHA undertook a duty that Asarco owed to them." *Id.* at 24a. In so holding, the district court relied upon decisions of two courts of appeals that had reached the same conclusion in cases involving MSHA inspections. *Ibid.* (citing *Myers* v. *United States*, 17 F.3d 890, 903 (6th Cir. 1994); *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ayala* v. *United States*, 49 F.3d 607, 611-614 (10th Cir. 1995)).

The district court observed that the Ninth Circuit "has created an exception to [the] rule" that FTCA liability is generally limited to "occasions in which a private person would be liable in the law of the place where the activity occurred"; under that exception, the court explained, the United States may be liable for activities that private persons do not perform, if "a state or municipal entity would be subject to liability under the law of the place where the activity occurred."

App., *infra*, 24a-25a. Concluding that "private parties do not have regulatory authority to perform mine safety inspections," *id.* at 25a, the court therefore considered whether "an Arizona state or municipal entity would be subject to liability for negligent inspection of a mine." *Ibid.* Although the court understood Arizona law potentially to expose an Arizona governmental entity to liability for failing to perform a mandatory safety inspection, *ibid.*, the court held that respondents nevertheless failed to state a claim in this case because they "failed to identify a statute or regulation 'that required MSHA to conduct an immediate inspection of the Mission Mine in response to the anonymous complaints or a mandatory regulation relating to the level of scrutiny of any MSHA mine inspection and subsequent enforcement." *Id.* at 25a.

ii. The district court also held that respondents' claims were barred by the discretionary function exception to the FTCA, which provides that the United States is not liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused," 28 U.S.C. 2680(a). App., *infra*, 15a-22a.

3. The court of appeals reversed and remanded. App., *infra*, 1a-7a.

a. The court of appeals declined to apply the principles of Arizona tort law that are applicable to private persons who conduct inspections—*i.e.*, the Good Samaritan doctrine. App., *infra*, 5a-6a. Instead, the court reasoned that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" *Ibid.* (citations omitted). On

that basis, the court concluded that Arizona tort law applicable to governmental entities rather than private persons should be applied, characterizing the question as "whether, under Arizona law, state and municipal entities would be liable under like circumstances." *Id.* at 6a. The court of appeals construed Arizona law to provide that state governmental mine inspectors would be subject to liability for failure to perform mandatory safety inspections. *Ibid.* By analogy, therefore, the court concluded that the federal government would be liable if it failed to perform mine inspections mandated by federal law. In the court of appeals' view, respondents had "allege[d] facts showing that Kirk and Varland breached mandatory duties under the Federal Mine Safety and Health Act, * * * the MSHA Handbook, and the Agency's Policy Manual." *Id.* at 7a. It therefore concluded that respondents had stated a claim for liability under the FTCA. *Ibid.*

b. The court of appeals also held that the discretionary function exception was inapplicable because it concluded that the government failed to establish at the motion-to-dismiss stage that the actions at issue were discretionary. App., *infra*, 2a-5a.[2]

c. The court of appeals denied the United States' petition for rehearing and rehearing en banc. App., *infra*, 34a-35a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals disregards the plain language of the Federal Tort Claims Act in a manner that fundamentally expands the FTCA's waiver of sovereign immunity beyond the bounds of

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[2] The United States does not seek review of that factbound aspect of the court of appeals' decision.

what Congress enacted. The decision is in clear conflict not only with the FTCA's text, but also with the decisions of this Court and the decisions of other courts of appeals. Review by this Court is warranted to resolve those conflicts and address an important and recurring issue that is basic to Congress's limited waiver of sovereign immunity for tort claims based on conduct of federal employees acting within the scope of their employment.

Subject to certain exceptions, the FTCA waives the sovereign immunity of the United States for tort claims so as to make it liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The incorporation of local law applicable to private persons is the cornerstone of the FTCA and its waiver of sovereign immunity. This Court's decisions leave no doubt that liability imposed on state governmental entities does not determine the FTCA liability of the United States, and that state-law Good Samaritan principles applicable to private individuals provide the appropriate benchmark for federal liability. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957). Nevertheless, without citing either *Indian Towing* or *Rayonier*, the court of appeals determined the United States' FTCA liability by reference to state law as it relates to state and municipal governmental entities, despite the existence of a readily available private analog. That decision is irreconcilable with the governing statutory language and this Court's seminal decisions.

Moreover, in declining to seek a private person analogy to determine the scope of the duty imposed under the FTCA for federal inspections and other regulatory activities, the decision below is contrary to the decisions of a number of other circuits—including two circuits that have resolved claims relating to the actions of federal mine inspectors by application of Good Samaritan principles, and not by reference to state law applicable to governmental entities. See *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981); *Ayala* v. *United States*, 49 F.3d 607, 611-614 (10th Cir. 1995); accord *Hylin* v. *United States*, 715 F.2d 1206 (7th Cir. 1983), vacated, 469 U.S. 807, on remand decided on other grounds, 755 F.2d 551 (7th Cir. 1985). Review by this Court therefore is warranted.

A. THE COURT OF APPEALS' DECISION CONTRAVENES THE PLAIN LANGUAGE OF THE FEDERAL TORT CLAIMS ACT AND IS CONTRARY TO DECISIONS OF THIS COURT

The FTCA confers jurisdiction upon the federal district courts to hear tort claims for money damages against the United States "under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). The United States is liable under the FTCA only "in the same manner and to the same extent as a *private individual under like circumstances*," except that it is not liable for prejudgment interest or punitive damages. 28 U.S.C. 2674 (emphasis added). The latter provision is a waiver of the government's sovereign immunity and should not be extended beyond the bounds which Congress intended. See *Smith* v. *United States*, 507 U.S. 197, 203 (1993).

Instead of applying the clear text of the FTCA, the court of appeals looked to "whether, under Arizona law, *state and municipal entities* would be liable under like

circumstances." App., *infra*, 6a (emphasis added). The court did so based on its conclusion that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" *Id.* at 5a-6a (citations omitted).[3] That analysis cannot be squared with the language of the FTCA or this Court's decisions. The plain text of the FTCA makes clear that the liability of the United States must be judged by reference to the liability of "a private individual under like circumstances," not by reference to the liability of a state or municipality.

Moreover, in its seminal decision in *Indian Towing*, *supra*, the Court rejected the government's suggestion that the Court impose liability on the United States "as if it were a municipal corporation and not as if it were a private person." 350 U.S. at 65. Acceptance of that suggestion, the Court reasoned, would saddle the FTCA with "the casuistries of municipal liability for torts." *Ibid.* Instead, the Court held that, even where the United States performs "uniquely governmental functions," the question is not whether a municipality would be liable, but whether a private party would be liable. *Id.* at 64-65 (internal quotation marks omitted).

[3] In taking that approach, the panel relied upon a line of Ninth Circuit cases holding that the court may look to state tort law applicable to governmental entities where the government is performing "activities that private persons do not perform." *Hines* v. *United States*, 60 F.3d 1442, 1448 (9th Cir. 1995) (holding that "[b]ecause private persons do not wield power to screen drivers of independent contractors who deliver bulk mail, the proper examination is whether state or municipal entities would be subject to liability"). This line of cases apparently derives from the Ninth Circuit's decision in *Louie* v. *United States*, 776 F.2d 819, 824-825 (9th Cir. 1985), discussed in note 7, *infra*.

That is so, the Court explained, because the statutory language calls for looking to the liability of a "private individual" in "like circumstances," not identical circumstances. *Ibid.* And, of particular relevance here, the Court then suggested that the liability of the United States for its allegedly negligent operation of a Coast Guard lighthouse should be resolved under the Good Samaritan doctrine applicable to private persons. *Id.* at 64-65, 69.

The Court reaffirmed *Indian Towing*'s reading of the FTCA in *Rayonier*, *supra*. In that case, which involved the alleged negligence of Forest Service firefighters, the Court held that the provisions of the FTCA, "given their plain natural meaning, make the United States liable * * * if * * * [state] law would impose liability on private persons or corporations under similar circumstances." 352 U.S. at 319. The Court deemed it irrelevant that public firefighters were immune under state law due to their "uniquely governmental capacity," *id.* at 318-319 (internal quotation marks omitted), observing that it "expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body." *Id.* at 319. Rather, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred." *Ibid.* See *United States* v. *Muniz*, 374 U.S. 150, 164 (1963) (holding that federal prisoners may bring suit under the FTCA even though state jailers or the State itself might be immune from tort suits by prisoners).

This case presents no anomalies or special difficulties in applying the text of the FTCA or this Court's precedents. Private entities—such as insurance compa-

nies, labor unions, consultants, employers, and landowners—routinely conduct safety inspections analogous to the mine inspections at issue here. See, *e.g.*, *Radcliffe* v. *Rainbow Constr. Co.*, 254 F.3d 772, 776-777 (9th Cir.) (discussing workplace inspections by union representatives), cert. denied, 534 U.S. 1020 (2001); *Camacho* v. *Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir. 1997) (describing state-law duty of commercial landowners to inspect premises). As the district court recognized, see App., *infra*, 23a-24a, in Arizona, where respondents' accident occurred, tort claims against private parties who conduct safety inspections are analyzed under the Good Samaritan doctrine, as defined in Sections 323 and 324A of the Restatement, *supra*, which describes the liability of one who undertakes to render services to another. See *Easter* v. *Percy*, 810 P.2d 1053 (Ariz. Ct. App. 1991) (claim against consulting engineers for negligent inspection and supervision of a construction project); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (claim that a private company negligently inspected and selected a defective beverage rack).

The court of appeals had no warrant to reject the analysis approved by this Court in favor of an analysis flatly at odds with the statutory language and this Court's decisions. Ignoring the private person reference mandated by the FTCA, the court of appeals believed that the liability of the United States should be determined by reference to Ariz. Rev. Stat. § 12-820 (1984), which declares it "to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." *Ibid.* (Historical and Statutory note, citing 1984 Ariz. Laws Ch. 285, § 1). Because the court of appeals determined that Arizona

has subjected itself to liability for violations of mandatory duties the State has imposed on its own employees, the court held that the United States could similarly be liable in tort for the breach by federal employees of mandatory duties imposed on them by federal law, without regard to whether a "private individual" would be liable under Arizona law "under like circumstances," 28 U.S.C. 2674. App., *infra*, 5a-7a.[4] That result cannot be reconciled with the text of the FTCA or this Court's decisions construing the Act, and should be rejected by this Court.

B. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit's decision in this case also is contrary to decisions of many other courts of appeals. Unlike the decision below, and consistent with the text of the FTCA, other courts of appeals look to the liability of private persons under state law—usually under the Good Samaritan doctrine—to determine the extent of the United States' waiver of its sovereign immunity for allegedly negligent federal inspections

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[4] The Ninth Circuit applied the same analysis in *Doggett* v. *United States*, 875 F.2d 684, 689-690 (1989), to hold that a California statute making local governments liable for violations of their enactments would, by analogy, make the United States liable for violations of federal regulations. See *Concrete Tie of San Diego, Inc.* v. *Liberty Constr., Inc.*, 107 F.3d 1368 (9th Cir. 1997) (analyzing, under the same rationale, whether the Small Business Administration had violated mandatory laws or regulations under a program for socially or economically disadvantaged small businesses, such that it could be liable under the FTCA for alleged failure to provide a contractor with an opportunity to earn a reasonable profit and alleged failure to investigate contractors' financial and technical capacity).

and similar regulatory activities. The government is aware of no case from another circuit adopting the analysis used by the Ninth Circuit in circumstances comparable to those here.

1. Most notably, the Sixth Circuit, in *Raymer*, *supra*, expressly refused to follow the approach adopted by the court below. Like this case, *Raymer* involved the alleged negligence of federal mine inspectors. 660 F.2d at 1137. The Sixth Circuit rejected the government's suggestion that it should rely upon Kentucky case law holding that state and local governmental entities were not liable in tort for failing to enforce safety regulations. *Id.* at 1141-1142.[5] The Sixth Circuit reasoned that such case law would be relevant "[i]f the FTCA made the federal government liable to the same extent that the state of occurrence makes itself and its political subdivisions liable." 660 F.2d at 1142. But because the FTCA does not do so, the *Raymer* court concluded that "decisions denying recovery against states and their political subdivisions on grounds of sovereign immunity are not germane to FTCA cases. The pertinent inquiry is whether state law makes a *private individual, not the state or other*

[5] As *Raymer* indicates, the government at one time advanced the argument that courts should look to the immunities of state and local governmental entities, or to the absence of a cause of action against such governmental entities, in determining whether the United States is liable under circumstances such as those presented here. That position was correctly rejected in *Raymer*. It is now the position of the government that such an approach cannot be reconciled with the text of the FTCA, even when the result would be to bar a suit against the United States, just as it cannot be so reconciled when the result would be to subject the United States to liability beyond that of a private individual in like circumstances.

political entity, liable for an employee's failure to exercise due care under like circumstances." *Id.* at 1140 (emphasis added). The Sixth Circuit instead referred to the Good Samaritan doctrine applicable to private persons to decide whether the United States was liable. *Id.* at 1142-1144. The Sixth Circuit has since followed *Raymer* in another FTCA case involving the alleged negligence of federal mine inspectors, see *Myers* v. *United States*, 17 F.3d 890, 893-894, 901 (1994), where it again analyzed the claims under the Good Samaritan doctrine. *Id.* at 901-905.

In accord with the Sixth Circuit, and in stark contrast to the court below, the Tenth Circuit also has applied state law as it relates to private persons to analyze FTCA claims based on the alleged negligence of federal mine inspectors. In so doing, the court recognized that the FTCA requires such an analysis even if the alleged negligence related to conduct mandated by federal law. Thus, in *Ayala*, *supra*, the Tenth Circuit analyzed a claim that a federal mine inspector had provided negligent technical advice to an engineer for a mining company. 49 F.3d at 610. Based on the text of the FTCA, the Tenth Circuit recognized that "[e]ven if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons." *Ibid.* The court therefore assessed the United States' liability under state law related to private persons, including the Good Samaritan doctrine. *Id.* at 611-614. Similarly, although the judgment was later vacated and the case decided on other grounds, 469 U.S. 807 (1984); see 755 F.2d 551 (7th Cir. 1985), the Seventh Circuit recognized in *Hylin* that, under the text of the FTCA and this Court's decisions, "[i]t is well established * * * that FTCA

liability may be based even on conduct which is 'uniquely governmental,' such as inspection and certification, as long as the state in which the conduct occurred would recognize liability if the government tortfeasor were a private person." 715 F.2d at 1210; *id.* at 1210-1213 (applying Good Samaritan doctrine).[6]

2. The decision below is likewise contrary to numerous decisions in other circuits that look to the state law duties of private persons to analyze FTCA liability for a variety of federal inspection and regulatory activities. See, *e.g.*, *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1143, 1145-1148 (1st Cir. 1977) ("A prerequisite for recovery under the [FTCA] is that there be a 'negligent or wrongful act or omission * * * under circumstances where the United States, *if a private person*, would be liable.") (quoting 28 U.S.C. 1346(b)), cert. denied, 435 U.S. 1006 (1978) (emphasis added); *Dorking Genetics* v. *United States*, 76 F.3d 1261, 1266-1270 (2d Cir. 1996) ("The FTCA * * * only waives immunity under circumstances that would create liability 'in the same manner and to the same extent *as a private individual* under like circumstances.'") (quoting 28 U.S.C. 2674; emphasis added); *Loge* v. *United States*, 662 F.2d 1268, 1271 (8th Cir. 1981) ("The [FTCA] is not a federal remedial scheme at all, but a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States

[6] Indeed, even the Ninth Circuit, in an earlier, unpublished per curiam decision in another FTCA case relating to the alleged negligence of federal mine inspectors, rejected the very analysis adopted by the panel below. See *Aguirre* v. *United States*, No. 01-16057, 2002 WL 1791516 (9th Cir. Aug. 5, 2002) (44 Fed. Appx. 166). The government relied upon *Aguirre* in its petition for rehearing and rehearing en banc, see Gov't C.A. Reh'g Pet. 2, 6-12, but the Ninth Circuit nevertheless denied further review.

where a private person 'would be liable to the claimant.'") (internal quotation marks omitted; emphasis added), cert. denied, 456 U.S. 944 (1982); *Pate* v. *Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004) ("The United States can only be found liable *if a comparable private party* would likewise be liable under Georgia law.") (emphasis added); *Howell* v. *United States*, 932 F.2d 915, 917 (11th Cir. 1991) ("[W]hether the United States is liable for the [Federal Aviation Administration] inspector's failure to act depends on *whether a similarly situated private employer* would be liable for such an omission under the law of Georgia.") (emphasis added).

For example, in two cases evaluating FTCA claims based on allegedly negligent inspection activities by, respectively, the Occupational and Safety Health Administration (OSHA) (*Pate*) and the Federal Aviation Administration (FAA) (*Howell*), the Eleventh Circuit has recognized that, "even where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the [FTCA] if state law recognizes no comparable private liability." *Pate*, 374 F.3d at 1084 (quoting *Sellfors* v. *United States*, 697 F.2d 1362, 1367 (11th Cir. 1983)). The Eleventh Circuit emphasized that, with respect to "uniquely governmental functions," the private analog "need not be exact." *Ibid.* (quoting *Howell*, 932 F.2d at 918). Instead, as noted in *Howell*, the court looks "to the closest state law analogue: the 'good samaritan' doctrine," which "has since been used by all circuits considering FTCA liability in a regulatory-enforcement context." *Howell*, 932 F.2d at 918 & n.3. The Eleventh Circuit in both *Pate* and *Howell* concluded that the United States was not liable under the applicable

State's articulation of the Good Samaritan doctrine. *Id.* at 918-920; *Pate*, 374 F.3d at 1084-1087.

Other circuits have taken the same approach. See, *e.g.*, *Zabala Clemente*, 567 F.2d at 1145-1148 (evaluating FTCA claim involving FAA aircraft surveillance under Good Samaritan doctrine); *Dorking Genetics*, 76 F.3d at 1266-1270 (evaluating FTCA claim based on allegedly negligent inspection by Department of Agriculture veterinarians under Good Samaritan and other private liability principles, and recognizing that the "government is not limited to the liability assigned to municipal corporations under common law, nor is it insulated from FTCA liability simply because the negligence was committed in the performance of a uniquely governmental function"); *Loge*, 662 F.2d at 1274 (analyzing under the Good Samaritan doctrine a claim of government negligence with respect to the testing and licensing of a vaccine).[7]

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[7] Questions involving the role of state law pertaining to governmental entities have also arisen in FTCA cases in which Park Rangers, DEA Agents, and similar federal law enforcement officers are alleged to have been negligent in carrying out certain of their functions (*e.g.*, stopping vehicles on the highway), for which there may often be no "private person" analog. Some courts of appeals—while recognizing that the relevant state law in such cases is that pertaining to private individuals and declining to apply state laws rendering a state or local government immune from suit—have nevertheless looked to whether a state law enforcement officer in similar circumstances would owe an actionable special duty to a particular member of the public to prevent injury, rather than a general duty to the public at large to enforce the law. See, *e.g.*, *Crider* v. *United States*, 885 F.2d 294, 296-298 (5th Cir. 1989), cert. denied, 495 U.S. 956 (1990); *Louie* v. *United States*, 776 F.2d 819, 825 (9th Cir. 1989); cf. *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F.3d 498, 502-505 (4th Cir. 1996); see also *Kaniff* v. *United States*, 351 F.3d 780, 790 (7th Cir. 2003) (leaving the question open). In some cases, the extent to which an officer acts under color of authority is relevant to the underlying tort; and in other cases, the consideration of state law principles applicable to state or local governmental entities may obscure the fact that there is no private person analogy, and thus no liability.

Cases involving law enforcement officers may raise distinct issues that are not presented here, such as the privileges or prerogatives that such officers necessarily have to arrest suspects where in other circumstances such conduct would constitute assault or battery. See, *e.g.*, *Washington* v. *DEA*, 183 F.3d 868, 874 (8th Cir. 1999). Often such special privileges or prerogatives are part of broader principles of state law that encompass actions by private individuals as well. See, *e.g.*, Restatement, *supra*, §§ 10, 63, 65, 76, 114, 119, 120A, 121, 196, 197. And federal law itself also confers certain privileges, or immunity from regulation under state law, on federal officers in certain circumstances. See *In re Neagle*, 135 U.S. 1, 61-63, 68-70 (1890).

3. Furthermore, by faltering at the first step of its analysis in looking to special rules rendering state governmental entities liable, the decision below ultimately reached a conclusion that is irreconcilable at a broader level with a host of decisions of other courts of appeals. Because the Ninth Circuit determined that "a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections," App., *infra*, 6a, the court concluded that the United States could be held liable if federal mine inspectors "breached mandatory duties under the Federal Mine Safety and Health Act, 30 U.S.C. 801 *et seq.*, the MSHA Handbook, and the Agency's Policy Manual," *id.* at 7a. That conclusion is flatly at odds with the holdings of other courts of appeals recognizing that "[i]t is virtually axiomatic that the FTCA does not apply 'where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of

its own affairs.'" *Sea Air Shuttle Corp.* v. *United States*, 112 F.3d 532, 536 (1st Cir. 1997). See, *e.g.*, *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994) (noting that "we have consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA"); *Johnson* v. *Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (en banc) (it "has consistently been held[] that 'the FTCA was not intended to redress breaches of federal statutory duties'"); *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157-1160 (D.C. Cir. 1985); *Clemente*, 567 F.2d at 1149; *Sellfors* v. *United States*, 697 F.2d 1362, 1365-1367 (11th Cir. 1983). The Ninth Circuit's novel holding to the contrary highlights—and magnifies—its error in straying from the "private individual" language of the FTCA. In so doing, the court severed all links with the scheme of tort liability adopted by Congress, and it veered into the territory exclusively governed by other remedial schemes with their own rules for when private causes of action are available. If left standing, the Ninth Circuit's decision could have the effect of transforming every federal law, regulation, and policy manual into a potential source of tort liability whenever state law makes state governmental entities liable for violations of similar state laws and regulations, without regard to whether a "private individual under like circumstances," 28 U.S.C. 2674, would owe any actionable duty to particular members of the public.

C. THE PETITION PRESENTS A RECURRING QUESTION OF FUNDAMENTAL IMPORTANCE

This Court's review is warranted because the decision below fundamentally undermines the liability scheme created by the FTCA. The FTCA embodies Congress's policy determinations as to the appropriate

scope of the United States' waiver of sovereign immunity for liability in tort. See, *e.g.*, *Indian Towing*, 350 U.S. at 68 ("The statute was the product of nearly thirty years of congressional consideration and was drawn with numerous substantive limitations and administrative safeguards."). Congress did not import into the FTCA each State's policy determinations regarding when state governmental entities should be held liable in tort. Instead, Congress defined the waiver of sovereign immunity with reference to the liability of "private individuals," 28 U.S.C. 2674, and it detailed specific exceptions to the FTCA's general waiver of sovereign immunity. 28 U.S.C. 2680.

Incorporating state-law rules of state governmental entity liability into FTCA cases—as the court did below—would inevitably subject the federal government to each State's policy decisions regarding governmental liability and would supplant Congress's contrary determination. Nothing in the FTCA authorizes such an approach. See *Indian Towing*, 350 U.S. at 65 (noting that liability under the FTCA is not governed by "the casuistries of municipal liability for torts"). Such a result would be highly destabilizing, given the enormous variation in, and constantly evolving nature of, state governmental immunity doctrines and state decisions about liability under state schemes through private causes of action, either express or implied.[8] The

[8] The changing nature of Arizona law defining the scope of governmental liability is instructive in this regard. Compare *Stone* v. *Arizona Hwy. Comm'n*, 381 P.2d 107, 109-112 (Ariz. 1963) (en banc) (abolishing "the rule of governmental immunity from tort liability" and announcing that "where negligence is the proximate cause of injury, the rule is liability and immunity is the exception"), with *Massengill* v. *Yuma County*, 456 P.2d 376, 381 (Ariz. 1969) (adopting public-duty doctrine), and *Ryan* v. *State*, 656 P.2d 597,

Ninth Circuit's decision is particularly disturbing because it rewrites the FTCA to premise tort liability on violations of duties imposed on federal employees by federal law, regulations, and policy manuals without regard to whether such provisions are privately enforceable. Just as there was "no justification for this Court to read exemptions into the Act beyond those provided by Congress" to clothe federal actors with state governmental immunity afforded by state law, *Rayonier*, 352 U.S. at 320, so too is there no justification for *expanding* the liability of the United States by subjecting it to state governmental liability that exceeds the "private individual" liability imposed by the FTCA whenever a federal employee has violated, or negligently performed, a federal duty. As this Court noted in *Rayonier*, "[i]f the Act is to be altered that is a function for the same body that adopted it." *Id.* at 320.

The question presented is a frequently recurring one. Federal agencies undertake many inspection and other regulatory activities similar to those at issue here. Indeed, the inspections activities of the Department of Labor alone, undertaken through MSHA and OSHA, have been the subject of FTCA litigation for many years. Federal agencies need to know the standards under which they may be liable for those activities, and the lower federal courts need to know the standards under which FTCA cases based on such activities are to be adjudicated. This Court has previously granted

599 (Ariz. 1982) (en banc) (overruling *Massengill* and renouncing the public-duty doctrine, while "hasten[ing] to point out that certain areas of immunity must remain" and observing that the legislature made state officers, agents, and employees immune to liability for injury or damage resulting from certain "discretion[ary]" acts or omissions).

review to resolve similar questions involving the proper interpretation of the FTCA. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004) (granting review to clarify the scope of the FTCA); *Smith*, 507 U.S. at 200 (granting review to resolve conflict between two courts of appeals on whether Antarctica falls within the "foreign-country" exception to FTCA); *Muniz*, 374 U.S. at 151 ("Because the decision below involves an important question in the construction of the [FTCA] and because two Courts of Appeals had previously reached a contrary result, we granted certiorari.") (footnote omitted). Review is warranted here as well.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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DECEMBER 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15141

JOSEPH OLSON, MONICA OLSON, JAVIER VARGAS,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

April 2, 2004

Before BETTY B. FLETCHER, STEPHEN REINHARDT, Circuit Judges, and JANE A. RESTANI,* Judge.

PER CURIAM.

Plaintiffs Joseph Olson, his wife Monica, and Javier Vargas appeal the district court's entry of final judgment on their Federal Tort Claims Act ("FTCA") claims pursuant to the government's motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

Joseph Olson and Vargas were permanently disabled when a nine-ton slab of earth fell from the ceiling of the mine where they were working. Plaintiffs sued the Mine Safety and Health Administration ("MSHA") al-

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* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

leging that the Agency was liable for the miners' injuries due to its negligence in carrying out or failing to carry out mandatory MSHA policies and procedures. Specifically, plaintiffs' claims for negligence arose from two main acts which they allege proximately caused their injuries: (1) MSHA Field Office Supervisor James Kirk's failure to evaluate six written and oral complaints he received regarding safety hazards at the mine; and (2) MSHA Inspector Alan Varland's failure to inspect the mine thoroughly and in its entirety.

The government moved to dismiss, and the district court granted the 12(b)(1) and (b)(6) motion on the grounds that the discretionary-function exception to the FTCA shielded the government from liability on plaintiffs' claims, and that no tort action was available for similar conduct under Arizona law. We disagree on both counts, and, accordingly, we reverse and remand.

I

The FTCA waives sovereign immunity for specified torts of federal employees, including negligent or wrongful acts or omissions "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, would be liable under the law of the state "where the act or omission occurred." 28 U.S.C. § 1346(b). A limitation on this waiver of sovereign immunity exists where the government is performing a "discretionary function," whether or not the discretion is abused. *Miller v. United States*, 163 F.3d 591, 593 (9th Cir.1998). However, the discretionary-function exception covers acts which involve an element of choice; it does not apply where a "federal statute, regulation, or policy specifically prescribe[s] a course of action for an employee to follow,"

because "[i]n this event, the employee has no rightful option but to adhere to the directive." *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L.Ed.2d 531 (1988). Further, the exception protects only government actions and decisions based on "social, economic, and political policy." *Id.* at 537, 108 S. Ct. 1954. The government bears the burden of establishing that the test is met and that discretionary immunity applies. *Miller*, 163 F.3d at 594.

Taking all of the allegations of the complaint as true, and construing these facts in the light most favorable to the nonmoving party, as we must when reviewing entry of final judgment on a 12(b)(1) and 12(b)(6) motion to dismiss, *see United States v. One 1997 Mercedes E420*, 175 F.3d 1129, 1131 n.1 (9th Cir. 1999), we hold that the government has failed to carry its burden here.

First, regarding Kirk's acts, the statute, 30 U.S.C. § 813(g), provides only that MSHA must respond with an "immediate inspection" when it receives safety hazard complaints that are "reduced to writing" and "signed by the representative of the miners or by the miner." However, although "many times, complaints concerning hazardous conditions do not meet the technical requirements" of 30 U.S.C. § 813(g), MSHA's General Inspection Procedures Handbook requires that "*all* complaints of alleged hazards . . . must be evaluated." General Inspection Procedures Handbook (April 1989), at 27 (emphasis added). Similarly, MSHA's Program Policy Manual mandates that, "[i]n these situations, the inspector receiving the information *must evaluate* and determine a course of action." Program Policy Manual, vol. 3, pt. 43 (emphasis added).

The Agency's own March 2000 internal investigation specifically concluded that, despite these compulsory

directives, Kirk failed to ensure that "*all* complaints" were handled in accordance with MSHA policy and procedures. Similarly, in its own subsequent report, the Office of Inspector General ("OIG") concluded that Kirk received valid complaints but did not "effectively evaluate" these complaints in determining a course of action. In fact, the OIG report relates that Kirk did not evaluate the anonymous complaints at all and that he dismissed them because he believed that anonymous complaints were not valid under 30 U.S.C. § 813(g). Because MSHA policies prescribe a course of action that Kirk failed to follow, we conclude that MSHA has not established that the discretionary-function exception covers Kirk's actions. *See Berkovitz*, 486 U.S. at 536.

We also hold that the government has failed to show that Varland's inspections of the mine fell within the discretionary-function exception. MSHA is required to "make inspections of each underground coal or other mine *in its entirety* at least four times a year." 30 U.S.C. § 813(a) (emphasis added). The accident occurred in or near an area of the mine that had been barricaded earlier, only to be re-opened for work shortly before the disaster. At least one complaint contained specific allegations that management had closed off certain areas prior to the inspectors' arrival "only for workers to again be sent back to those areas a few days later to work under poor conditions."

Although the OIG reported evidence that Varland entered the barricaded areas of the mine during his March 1999 inspection, the report also stated that, despite the allegations regarding such areas, they were *not* inspected during the subsequent April 1999, May 1999, and September 1999 inspections conducted by

Varland (or during the November 1999 inspection conducted by his successor). In short, the mine was not, as mandated by statute, inspected in its entirety. Thus, MSHA has not established that the discretionary-function exception covers Varland's actions.

In sum, the government has failed to establish that discretionary immunity applies with respect to either Kirk's or Varland's actions. *See Miller*, 163 F.3d at 594.

II

Because the FTCA does not create liability, but merely waives sovereign immunity to the extent that state-law would impose liability on a "private individual in similar circumstances," 28 U.S.C. § 2674, we must also determine whether plaintiffs have pled facts sufficient to justify the imposition of liability under ordinary state-law principles.

Generally, the United States can be held liable under the FTCA only when liability would attach to a private actor under the law of the place where the tort occurred. *Delta Savings Bank v. United States*, 265 F.3d 1017, 1024 (9th Cir. 2001). However, the United States may be liable "'for the performance of some activities that private persons do not perform,' . . . when a state or municipal entity would be held liable under the law where the activity occurred." *Concrete Tie of San Diego, Inc. v. Liberty Constr., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997) (quoting *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995)). In such instances, liability attaches if the United States breaches "a mandatory duty for which a cause of action lies." *Id.*

As a threshold matter, we hold that the district court correctly determined that there is no private-sector analogue for mine inspections because private parties

"do not wield [regulatory] power," *Hines*, 60 F.3d at 1448, to conduct such "unique governmental functions." *Doggett v. United States*, 875 F.2d 684, 689 (9th Cir. 1989). The question thus becomes whether, under Arizona law, state and municipal entities would be liable under like circumstances. The answer is yes. As the district court pointed out, a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections. *See Diaz v. Magma Copper Co.*, 190 Ariz. 544, 554-55, 950 P.2d 1165 (App. 1997). In so holding, the *Diaz* court specifically rejected the state agency's argument that the state should be immune from liability in this context because mine inspections require the determination of government policy. The court explained that, under the Act granting absolute and qualified immunity for certain state actions, Actions Against Public Entities or Employees, Ariz. Rev. Stat. §§ 12-820-12-826, Arizona construes state immunity narrowly.[1]

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[1] The government argues that *Diaz* is no longer applicable because of a subsequent amendment that altered some of the wording of the Arizona statute granting state employees qualified immunity for certain conduct. We disagree. The amendment seems to have been undertaken to simplify the language of the provision and clarify the legislature's intent. At the time *Diaz* was decided, Arizona law provided qualified immunity, unless the public employee intended to cause injury or was grossly negligent, for the "failure to discover violations of any provision of law *requiring inspections* of property other than property owned by the public entity in question." *See* Ariz. Rev. Stat. § 12-820.02(A)(6) (West 1998) (emphasis added to highlight amended text). In 1999, the provision was amended slightly to grant qualified immunity for "failure to discover violations of any provision of law *when inspections are done* of property other than property owned by the public entity in question." *See* Ariz. Rev. Stat. § 12-820.02(A)(6) (West 1999) (emphasis added). The government provides no argument why this non-substantive, clarifying amendment to the qualified immunity statute would alter the *Diaz* court's analysis in any way, and accordingly, we conclude that *Diaz*'s reasoning and holding were unaffected by the amendment.

Moreover, under the Arizona statute, immunity applies only when an inspection *is* conducted, but fails "to discover violations." Thus, the provision would *not* apply to plaintiffs' allegations that Kirk failed to evaluate safety complaints and that Varland failed to conduct required inspections *at all*. Finally, even if the statute were applicable, the governmental conduct at issue here might well constitute "gross negligence."

Because the plaintiffs allege facts showing that Kirk and Varland breached mandatory duties under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq., the MSHA Handbook, and the Agency's Policy Manual, we conclude that, for purposes of 12(b)(6), they have stated a claim under state law principles.

III

For the foregoing reasons, we REVERSE the district court's entry of final judgment in favor of the government, and REMAND for further proceedings in conformance with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CIV-01-663-TUC-WDB
CIV-02-323
(Consolidated)

AMPARO VILLANUEVA, ET AL., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[Filed: Dec. 26, 2002]

ORDER

Pending before the Court are Defendant's Motions to Dismiss based on a lack of subject matter jurisdiction and failure to state a claim. This case stems from a mining accident whereby one miner was killed (Jose Villanueva) and two were seriously injured (Joe Olson and Javier Vargas). The Villanueva case (CV 01-663) was filed separately and prior to the filing of the Olson/Vargas (CV 02-323). However, due to the fact that the cases arise from the same mining accident, this Court granted Defendant's motion to consolidate these cases. Defendant has now filed one motion to dismiss the claims of the Villanueva Plaintiffs and another separate motion to dismiss the claims of the Olson and Vargas Plaintiffs.

I. FACTUAL BACKGROUND

This Federal Tort Claims Act ("FTCA") action arises out of a January 31, 2000 mining accident in which Jose Villanueva was killed, and Joe Olson and Javier Vargas were seriously injured at Asarco's Mission Underground Mine ("Mine") near Sahuarita, Arizona. The accident occurred when Villanueva and two other Asarco employees were loading explosives in predrilled holes in the ceiling of an underground room when a nine-ton slab of earth dislodged from the room's ceiling.

Just a few weeks prior to the accident, Asarco had reopened the 215-north slope at the Mission Underground Mine and was using a "back-stop" approach (drilling holes into a ceiling, then placing explosives in those holes to blast loose pieces of the ceiling) in which it was excavating the ceiling of previously developed rooms. Asarco planned two rounds of back-stopping and had nearly completed the first round when the accident occurred.

Evidence uncovered during a post-accident investigation by the Department of Labor's Inspector General revealed that Mine Safety and Health Administration ("MSHA") Supervisor James Kirk received an anonymous written complaint about the Mission Underground Mine in January 1999 and five anonymous telephone complaints between May and September of 1999. Three calls were from Villanueva's daughter and two from a family friend. Villanueva's daughter refused to identify herself to Kirk because she said that Asarco had retaliated against miners who complained about working conditions. Kirk did not initiate an immediate inspection based upon these anonymous complaints.

In September of 1999, MSHA inspector Alan Varland performed a regularly scheduled inspection. During that inspection, Villanueva complained specifically about inadequate ground control to prevent rock fall. The subsequent investigation revealed that Varland did not conduct a thorough investigation. The investigation also concluded that Asarco had not properly supported the ceiling with appropriate ground supports. Lastly, the investigation also revealed Villanueva's identity was disclosed to Asarco as the source of the anonymous complaints (**facts and claims relating to the disclosure of the identity of Villanueva as the source of anonymous complaints are *only* relevant to the Villanueva Plaintiffs, not the Olson/Vargas Plaintiffs).

The final report from the Inspector General faulted Kirk for improperly determining that the anonymous complaints were invalid, improperly documenting the complaints, improperly discarding all his notes on the matter, and failing to order an immediate inspection of the alleged imminent hazard. The Inspector General also found that Varland's disclosure of Villanueva's identity violated MSHA policy.

Plaintiffs Olson and Vargas are now suing the United States for negligence. They allege that due to its negligence, they have suffered permanent physical injuries and other damages stemming from those injuries. Olson and Vargas' claims for negligence arise from two circumstances: (1) Kirk's failure to consider the informal complaints and failure to order immediate inspections of the Asarco mine; and (2) Varland's failure to conduct an adequate investigation of the mine. In contrast, these facts no longer serve as a basis for liability for the Villanueva Plaintiffs. This Court has already previously granted (denying leave to amend) Defendant's

motion to dismiss Villanueva's claims based on those two circumstances. Thus, the Villanueva Plaintiffs' only remaining claim for recovery stems from the fact that Varland disclosed to Asarco that Jose Villanueva was the source of anonymous complaints. Because the respective claims now stem from different circumstances, the Olson and Vargas claims will be evaluated separately from the Villanueva claims.

II. STANDARD OF REVIEW

When a party asserting a F.R.C.P. 12(b)(1) motion to dismiss for lack of jurisdiction submits extrinsic evidence for the Court's consideration, the Court may consider such evidence, and the party asserting subject matter jurisdiction bears the burden to produce evidence necessary to establish subject matter jurisdiction. See *Assoc. of American Medical Colleges v. U.S.*, 217 F.3d 770, 778-79 (9th Cir. 2000) quoting *St. Claire v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

In reviewing a motion to dismiss for failure to state a claim, this Court's review is limited to the contents of the complaint. *See Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994) (citations omitted). All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Id.* A complaint should not be dismissed unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *Id.* However, the Court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Id.* at 754-55.

III. LEGAL STANDARDS

1. The Federal Mine and Safety Act ("FMSHA")

Under FMSHA, 30 U.S.C. § 801, et. seq., mine operators, like Asarco, have the primary responsibility for the prevention of unsafe and unhealthy conditions. *See* 30 U.S.C. § 801(d), (e). One of their duties is to find and eliminate hazardous ground conditions. *See e.g.*, 30 C.F.R. §§ 57.3200, 57.3360, and 57.3401. However, the Secretary of Health and Human Services and the Secretary of Labor are directed to promulgate mandatory standards to protect to the health and safety of miners. *See id.* at § 801(g). Furthermore, representatives of the Department of Labor are directed to make at least four inspections each year to ensure compliance by mine operators and to detect any imminent dangers. *See id.* at § 813(a).

In addition, a miner has the right to an immediate inspection if he has reasonable grounds to believe that a violation has occurred or an imminent danger exists and if he provides a written and signed notice to an inspector. *See id.* at § 813(g)(1). A copy of this written notice is provided to the mine operator, but the miner's name is to be omitted from that copy of the notice. *See id.* Upon receipt of the notice, the inspector shall conduct a "special inspection" as soon as possible. *See id.* While the statute requires a written and signed notice, the MSHA General Inspection Procedures Handbook in force at the time of the accident noted that some complaints may not meet the technical requirements of the statute, yet required that "all complaints . . . must be evaluated," and "[i]f appropriate, inspection steps must then be taken." *See* MSHA General Inspection Procedures Handbook at 27. Similarly, the MSHA Program Policy Manual also noted that informal complaints still require that the inspector "must evaluate and determine a course of action, which in some cases may result in an immediate inspection, but in other cases may not." *See* MSHA Program Policy Manual, Vol. III at 42-1.

2. The Federal Tort Claims Act ("FTCA")

The FTCA is a limited waiver of sovereign immunity and the sole means by which a plaintiff can sue the United States in tort. *See e.g., Vickers v. U.S.*, 228 F.3d 944, 948-49 (9th Cir. 2000). In addition, Plaintiffs bear the burden of pointing to an unequivocal waiver of immunity. *See Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984). As it pertains to the claims in this case, the Court will briefly discuss the underlying basis for liability under the FTCA as well as the intentional tort and discretionary function exceptions.

(a) Underlying Basis for Liability

Under the FTCA, the United States is liable only "if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). Therefore, even if a specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes comparable liability for private persons. *See e.g., Zabala Clemente v. United States*, 567 F.2d 1140, 1149 (1st Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978).

(b) Intentional Tort Exception

While the FTCA waives the United States' sovereign immunity as to some tort claims, the United States has not waived its immunity as to all claims. For example, the FTCA generally bars the United States' liability for certain intentional torts, including assault and battery. *See* 28 U.S.C. § 2680(h). Furthermore, the application of the intentional tort exception falls within the purview of federal, not state, law. *See Woods v. United States*, 720 F.2d 1451, 1453 n.2 (9th Cir. 1983).

(c) Discretionary Function Exception

As a threshold matter, even assuming that Plaintiffs can state a claim under Arizona law, the FTCA shields the United States for claims "based upon the exercise or performance of [*sic*] the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused.*" 28 U.S.C. § 2880(a) (*emphasis added*). The U.S. Supreme Court has established a two-prong test to determine whether the discretionary function exception has been met. First, a court must determine if a government employee's action is discretionary or mandatory. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991). A discretionary act has been defined as "one that involves choice or judgment." *Id.* at 325. On the other hand, discretion is not found where a "'federal statute, regulation or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but adhere to the directive.'" *Id.* at 322 *quoting Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, if the conduct is discretionary, the court must determine if the employee's discretion is

based on considerations of public policy. *See id.* at 322. If the government proves the first prong, it "must be presumed" that the employee's acts "are grounded in policy when exercising that discretion." *Id.* at 324. Therefore, even acts made at the operational level are subject to the exception so long as they are made in furtherance of the policy scheme. *See id.* at 324-25. Furthermore, the actual decision "need not *actually* be grounded in policy considerations so long as it is by its nature, susceptible to a policy analysis." *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002). Ultimately, the exception is designed to prevent judicial second-guessing of legislative and administrative decisions based upon social, economic, or political policy. *See Gaubert*, 499 U.S. at 323.

While Plaintiffs bear the burden of pointing to an unequivocal waiver of immunity, the government bears the burden on the discretionary function exception. *See GATX/Airlog Co.*, 286 F.3d at 1174 (citation omitted). Finally, if the discretionary function exception applies, this Court lacks subject matter jurisdiction. *See id.*, 286 F.3d at 1173.

IV. ANALYSIS OF THE CLAIMS OF THE OLSON AND VARGAS PLAINTIFFS: THE DISCRETIONARY FUNCTION EXCEPTION BARS THEIR CLAIMS

As discussed earlier, Plaintiffs' claims for relief stem from the negligence of two MSHA employees. As a threshold matter, these incidents must be evaluated to determine if the discretionary function of the FTCA applies.

1. Kirk's Failure to Consider Informal Complaints and Failure to Order Immediate Inspections

Defendant argues that Kirk's decision not to order an immediate inspection of the Mine based upon the anonymous complaints is protected by the discretionary function exception. Defendant claims that since the anonymous complaints did not meet the requirements of 30 U.S.C. § 813(g)(1), Kirk was not required to initiate an immediate inspection under the statute or the MSHA's policies. In addition, Defendant argues that where the §813(g)(1) procedures are not met, the language in the MSHA General Inspection Procedures Handbook ("MSHA Handbook") specifically gives the MSHA inspector wide discretion to order an immediate inspection.

Under §813(g)(1), an immediate inspection is only required where the miner or a miner representative believes that the mine he is working in is operating in violation of a safety provision of the FMSHA and the miner gives such notice to a MSHA inspector "in writing, signed by the representative of the miners or by the miner." *Id.* However, pursuant to the MSHA handbook, even if the complaint does not meet these formal procedures, all complaints (anonymous or not) must be evaluated by the MSHA inspector. Based on this evaluation, the MSHA inspector must independently decide whether an immediate inspection is warranted.

Plaintiffs argue that Kirk's actions were in fact mandatory, and therefore do not meet the first prong of the discretionary function exception. First, Plaintiffs argue that Kirk had a mandatory duty to evaluate the anonymous complaints to determine if an immediate

inspection was necessary. Plaintiffs argue that Kirk did not evaluate these complaints, thereby violating a mandatory duty. To support this claim, Plaintiffs rely on a report from the Office of the Inspector General ("OIG Report") investigating the accident in question. However, Plaintiffs take several statements out of context to make it appear as if Kirk did not evaluate the complaints. A close reading of the OIG Report only points to the conclusion that Kirk did in fact evaluate the complaint [*sic*]. The OIG report states:

> According to MSHA's March 7, 2000 internal investigation, the Mesa field office supervisor *evaluated* the complaints and made the determination that these complaints were not valid because the person(s) did not identify themselves. Moreover, the mine inspector state [*sic*] in sworn testimony that both he and the field office supervisor *believed* these were not valid complaints because the verbal complaints received by the field office supervisor were not specific enough . . . . We concluded that the field office supervisor *did not effectively evaluate* the complaints in determining a course of action. We also determined that he did not act prudently in failing to document the complaints.

Exhibit 1 to Plaintiff's Response, p. 5-6 (*emphasis added*). As this language shows, the OIG Report that Plaintiffs rely on to argue that Kirk did not evaluate the complaints actually rebuts their contention, and specifically states that Kirk did evaluate the complaints in question. For purposes of the discretionary function exception, the fact that the OIG report concluded the evaluations were not effective is irrelevant.

Even if the Court assumed that Kirk did not evaluate the complaints, the line of causation to support Plaintiffs [*sic*] claim of negligence based on Kirk's actions or lack thereof must lead to the ultimate failure of Kirk to order an immediate investigation of these complaints, which was a discretionary act. Decisions regarding whether to order the inspections in response to anonymous complaints and the scrutiny of those inspections is ultimately left to the government's discretion. Because the complaints were anonymous, Kirk was not required to order an immediate inspection. *See* §813(g). In this situation, the MSHA Handbook on page 27 states: "*If appropriate*, inspection steps must be taken." (*emphasis added*). Thus, in the anonymous complaint situation, the MSHA Handbook on page 3 also states: "In these situations, the inspector receiving the information must evaluate and *determine a course of action*, which in some cases *may* result in an immediate inspection, but in other cases it *may not*." (*emphasis added*). Pursuant to the MSHA policies, Kirk's actions would clearly involve judgment or choice. As such, Kirk's actions or lack thereof were discretionary. Thus, the first prong of the discretionary function exception is met. *See* 28 U.S.C. §2680(a); *U.S. v. Gaubert*, 499 U.S. 315, 323 (1991).

The second prong of the discretionary function exception requires that discretionary action be based on considerations of policy. *Gaubert*, 499 U.S. at 322. Since Kirk's actions were discretionary, it "must be presumed" that Kirk's acts "are grounded in policy when exercising that discretion." *Id.* at 324. Kirk's actions need not actually be grounded in policy, so long as they were "susceptible to policy analysis." *GATX/Airlog Co. v. United States*, 286 F.3d 1168 (9th

Cir. 2002). Many cases have applied the discretionary function exception to actions or inactions by MSHA inspectors. See *Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996) (applying exception to negligent failure to discover safety violations); *Deel v. United States*, 923 F. Supp. 98 (W.D. Vir. 1996) (applying exception to claim that mine inspector failed to make a thorough inspection); and *Estate of Denny Bernaldes v. United States*, 877 F. Supp. 301 (W.D. Va. 1995). *See also Hylin v. United States*, 755 F.2d 551 (7th Cir. 1985); *Russell v. United States*, 763 F.2d 786 (10th Cir. 1985); *and Bernitsky v. United States*, 620 F.2d 948 (3rd Cir.), *cert. denied*, 449 U.S. 870 (1980).[1]

The analytical approach applied by these recent MSHA cases is consistent with precedent from the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit. *See United States v. Varig Airlines*, 467 U.S. 707, 820 (1984) (holding that the discretionary function exception protected FAA employees in executing spot-check inspection program because the program "specifically empowered [employees] to make policy judgments regarding the degree of confidence that might reasonably be placed in a given manufacturer, the need to maximize compliance with FAA regulations, and the efficient allocation of agency resources"). See also *GATX/Airlog Co. v. United States*, 286 F.3d 1168, 1174 (9th Cir. 2002) (applying the discretionary function exception to FAA inspections). In *GATX/Airlog Co.*, the Ninth Circuit recently held that, even if a decision is based entirely upon objectively scientific standards, "the questions is

[1] The Court notes that these are pre-*Gaubert* cases, yet believes that the cases do lend some helpful analysis of the duties of MSHA inspectors.

[sic] not whether policy factor necessary for a finding of immunity were *in fact* taken into consideration, but merely whether such a decision is *susceptible* to policy analysis." *Id.* at 1174. In addition, "[s]imply because technical data is at issue does not mean that the decisions are stripped of their policy implications." *Id.* at 1177.[2] *See also, Cunningham v. U.S.*, 786 F.2d 1445, 1446-1447 (9th Cir. 1986) (holding that the discretionary function exception applied to allegedly negligent inspections performed by the Occupational Safety and Health Administration).

In light of the Ninth Circuit's recent decision in *GATX/Airlog Co.*, the Court believes that the Ninth Circuit would find that the discretionary acts in this

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[2] The Court notes that two Circuit Courts of Appeals have taken an opposite view and find that the discretionary function exception does not apply to MSHA inspections. *See Myers v. United States*, 17 F.3d 890 (6th Cir. 1994) and *Ayala* v. *United States*, 980 F.2d 1342, 1349-50 (10th Cir. 1992). In *Myers*, the United States Court of Appeals for the Sixth Circuit found that the second prong of the discretionary function test is *not* satisfied when a determination is made by the mere "application of objective scientific standards." *Myers*, 17 F.3d at 897. Since MSHA inspectors are only authorized to determine compliance and issue mandatory citations, the Sixth Circuit found that the discretionary function exception had not been satisfied. *See id.* at 898. However, the Court believes these are inconsistent with recent Ninth Circuit authority. Lastly, the Court notes that the Plaintiffs cited several Ninth Circuit cases for the proposition that the MSHA actions in question are not susceptible to policy analysis. Plaintiffs' reliance on these cases is misplaced. Those cases stemmed largely from circumstances where the government was itself responsible for maintaining safe conditions on its own land. However, in cases such as this one where the federal government is only responsible for establishing safety standards and monitoring compliance with such standards, the Ninth Circuit has held that discretionary acts of the inspectors are susceptible to policy analysis.

case were susceptible to policy analysis and would therefore grant discretionary function immunity to MSHA inspectors relating to mine inspection claims raised in this matter. Accordingly, the Court finds that Kirk's actions were discretionary and that those actions are susceptible to policy analysis. Thus, the discretionary function exception applies to Plaintiffs' claims stemming from Kirk's actions. Defendant's motion to dismiss Plaintiffs' claims stemming from Kirk's conduct based on the discretionary function exception is granted.

2. <u>The Adequacy of Varland's Inspection of the Mine</u>

Plaintiffs next argue that Varland's negligent inspection of the Mine was a proximate cause of the injuries in question. Plaintiffs claim the relevant statutes and polices mandated that Varland conduct a more adequate inspection and objectively required Varland to issue citations for the utterly unsafe conditions in the Mine. Plaintiffs essentially claim that because the conditions in the mine were so objectively unsafe, Varland was required to issue citations and conduct a more thorough inspection.

Despite Plaintiffs claims to the contrary, the relevant laws and policies in place at the time of the Varland inspection clearly gave Varland wide discretion in his inspections. Under 30 U.S.C. §814:

> If, upon inspection . . . the Secretary or his authorized representative *believes* that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard . . . he shall . . . issue a citation to the operator." (*emphasis added*)

Defendant goes on to cite a plethora of other relevant provisions containing language clearly showing that Varland had wide discretion in determining the scope of his inspection and when to issue sanctions against mines. Thus, Varland's conduct was clearly discretionary. Although Varland may have conducted a grossly inadequate inspection, the FTCA unfortunately still shields his actions if they were discretionary. *See* 28 U.S.C. §2680(a) (the federal government is shielded from liability where the government agent's conduct was "based upon the exercise or performance *or the failure to exercise or perform a discretionary function or duty . . . whether of [sic] not the discretion involved be abused.*") (*emphasis added*). For the same reasons stated in relation to Kirk's conduct, Varland's discretionary acts are also susceptible to policy analysis.

Pursuant to the foregoing analysis, Olson and Vargas' claims based on the conduct of both Kirk and Varland are clearly barred by the discretionary function exception of the FTCA. As such, pursuant to 28 U.S.C. §2680(a), Defendant's motion to dismiss all of Olson and Vargas' claims is granted.

IV. ANALYSIS OF OLSON AND VARGAS' CLAIMS: FAILURE TO STATE A CLAIM

Even assuming that the discretionary function exception does not apply, Plaintiffs' claims are still barred because they fail to state a claim. Pursuant to the relevant authority, Plaintiffs' claims relating to the conduct of Kirk and Varland must be analyzed under both the Restatement (Second) of Torts and Arizona common law relating to governmental entities' duties to perform inspections. Whether analyzed under either

body of law, Plaintiffs have failed to state a claim under Arizona law.

1. Potential Liability Under the Restatement

Negligent inspection claims in Arizona are governed under sections 323 and 324A of the Restatement. *See e.g., Daggett v. County of Maricopa*, 160 Ariz. 80, 85, 770 P.2d at 384, 389 (App. 1989) and *Easter v. Percy*, 168 Ariz. 46, 49; 810 P.2d 1053, 1056 (App. 1991).

> Section 323 of the Restatement provides as follows:
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance on the undertaking.

Id.

> Section 324(a) of the Restatement sets forth as follows:
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his

failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id.

Because Plaintiffs have no facts that could support a finding that MSHA's decisions increased the risk of harm to them or that MSHA undertook a duty that Asarco owed to them, they can not state a claim pursuant to the Restatement. Other federal cases involving MSHA inspections have come to similar conclusions. *See Myers v. United States*, 17 F.3d 890, 903 (6th Cir. 1994) and *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981) (rejecting § 324A claim against MSHA employees). *See also e.g., Ayala v. United States*, 49 F.3d 607, 611-14 (10th Cir. 1995) (refusing to find that MSHA has a duty of care in providing technical assistance because mine operators are primarily responsible for mine safety). As such, the Court concludes that Plaintiffs have failed to state a viable negligent inspection claim under the Restatement.

2. Potential Liability Under Arizona Common Law

While the FTCA normally limits the liability of the United States to occasions in which a private person would be liable in the law of the place where the activity occurred, the Ninth Circuit has created an exception to this rule such that the United States "may

be liable under the FTCA 'for the performance of some activities that private persons do not perform', but only when a state or municipal entity would be subject to liability under the law of the place where the activity occurred." *Concrete Tie of San Diego, Inc. v. Liberty Const., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997) citing *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995). Since private parties do not have regulatory authority to perform mine safety inspections, the Court must look to see if an Arizona state or municipal entity would be subject to liability for a negligent inspection of a mine. *See Hines*, 60 F.3d at 1448. In that regard, Arizona has held that a state governmental entity, including a state mine inspector, could be potentially liable of negligently performing required safety inspections. *See Daggett v. County of Maricopa*, 160 Ariz. 80, 85, 770 P.2d at 384, 389 (App. 1989) (finding governmental entity owed duty of inspection to water park patron based upon regulations requiring entity to perform inspections), *and Diaz v. Magma Copper Co.*, 190 Ariz. 544, 554-55, 950 P.2d 1165, 1175-76 (App. 1997) (finding mine inspector potentially liable for failing to inspect mine). Nonetheless, as discussed earlier, Plaintiffs have failed to identify a statute or regulation that required MSHA to conduct an immediate inspection of the Mission Mine in response to the anonymous complaints or a mandatory regulation relating to the level of scrutiny of any MSHA mine inspection and subsequent enforcement. Thus, Plaintiffs have failed to state a claim under Arizona law. *See e.g., Keams v. Tempe Technical Institute, Inc.*, 16 F.Supp.2d 1119, 1123 (D. Ariz. 1998).

Accordingly, the Olson and Vargas Plaintiffs have failed to state a claim under Arizona law. As such,

Defendant's motion to dismiss all of their claims based on failure to state a claim is granted.

V. ANALYSIS OF VILLANUEVA'S CLAIMS

The claims for the Villanueva plaintiffs stem solely from Varland's failure to maintain Villanueva's confidentiality. As Plaintiffs allege and Defendant concedes, contrary to the FMSHA and the relevant regulations, Varland failed to maintain Villanueva's confidentiality and, in fact, disclosed his identity to Asarco in direct violation of the relevant authority on confidentiality [*sic*]. As a result, Plaintiffs claim that this disclosure proximately caused Villanueva's death.

1. Negligence/Constructive Fraud

Plaintiffs claim that Varland's disclosure was negligent and in violation of the confidential relationship between miners and MSHA inspectors. They argue that the relevant MSHA regulations required inspectors to bring information received about dangerous conditions to the attention of mine operators without revealing the identity of the person providing the information. They argue that MSHA policy prohibited revealing the name of a complaining miner to the mine operator because MSHA knew that mine operators would often retaliate against miners who made safety complaints. Despite this policy and knowledge of potential retaliation, Plaintiffs argue that Varland disclosed Villanueva as the source of safety complaints, and this led to retaliation by Asarco which proximately caused Villanueva's death.

In response, Defendant argues that these claims are barred by 28 U.S.C. §2680(h) which states that any claims "arising out of . . . misrepresentation [or]

deceit" is barred by the FTCA. Defendant argues that the claims in question essentially arise out of misrepresentation or deceipt, and are therefore barred by §2680(h).

Defendant's attempt to characterize Plaintiff's claim as misrepresentation or deceipt [*sic*] must fail. Pursuant to the allegations in Plaintiffs' complaint, they have viable claims for negligence and constructive fraud:

> Constructive fraud is defined as a breach of a legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or private confidences, or injures public interests . . . Constructive fraud in [certain] context[s] means that a negligent omission of a regulatory requirement or noncompliance with a regulation cause prejudice to persons whom the regulation was intended to protect . . .

See Taeger v. Catholic Family and Communtiy Services, 196 Ariz. 285, 289 (App. 1999). Accepting Plaintiffs' allegations as true, Plaintiffs' [*sic*] meet this standard. This standard provides the relevant duty for Plaintiffs' negligence claim to survive and the relevant standard for constructive fraud. MSHA regulations imposed a mandatory duty upon Varland to not disclose the fact that Villanueva was the source of numerous safety complaints to Asarco. This policy was instituted to protect miners because MSHA knew that mine operators often retaliated against complaining miners. Varland either negligently or intentionally told Asarco operators that Villanueva was the source of safety

complaints in direct violation of MSHA regulations and policies. This disclosure resulted in retaliation from Asarco which eventually led to the death of Villanueva. Pursuant to relevant Arizona authority and the facts alleged in Plaintiffs' complaint, Plaintiffs' claims for constructive fraud and negligence are viable claims.

Despite Plaintiffs' allegations and this Arizona authority, Defendant argues that Plaintiffs' claim arises out of misrepresentation or deceit. Defendant essentially argues that the crux of the Plaintiffs' claims is that Villanueva was deceived into trusting the inspector to maintain his confidence. Defendant argues that Varland did indeed make misrepresentations because Varland impliedly represented that he would follow MSHA policies and would not disclose Villanueva as a source of complaints. Defendant then argues Villanueva relied on these implied representations to his detriment. Accordingly, Defendant argues that Plaintiffs claim must be labeled misrepresentation or deceipt [*sic*], and are thereby barred by §2680(h). However, Plaintiffs never allege that Varland actually or impliedly misrepresented anything. Plaintiffs' facts as alleged simply show that Varland had a duty to protect Villanueva's confidentiality pursuant to specific MSHA regulations, Varland violated this mandatory duty, and this resulted in Villanueva's death. Under these alleged facts, there was no deceit or misrepresentation that would bar Plaintiff's claims pursuant to §2680(h). Lastly, despite Defendant's arguments to the contrary, misrepresentation or deceit is not an essential element a [*sic*] claim for constructive fraud. The definition of constructive fraud cited above clearly rebuts this argument. Accordingly, Defendant's motion to dismiss

Plaintiffs' claim for negligence and constructive fraud are denied.

2. <u>Intentional Infliction of Emotional Distress</u>

Plaintiffs alternatively claim that Varland entered into a conscious agreement with Asarco to pursue a common plan to commit the tort of intentional infliction of emotional distress against Villanueva.

Plaintiffs' claim for emotional distress must be dismissed for failure to state a claim. The biggest flaw in Plaintiff's claim for emotional distress is a lack of causation in the death of Villanueva. To prove their intentional infliction of emotional distress claim, Plaintiffs must prove that: (1) Defendant's conduct was extreme and outrageous; (2) Defendant either intended to cause emotional distress or recklessly disregarded the near certainty that would result from his conduct, and (3) Severe emotional distress occurred as a result of Defendant's conduct. *See Johnson v. McDonald*, 197 Ariz. 155 (App. 1999). Even assuming these elements are met, Plaintiffs' claim is still barred by the Arizona wrongful death statue. A.R.S. 12-611 states:

> <u>When death of a person is caused by wrongful act, neglect or default</u>, and the act, neglect or default is such as would, if death had ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages . . . (*emphasis added*)

In light of the fact that Mr. Villanueva was killed in the Asarco mine, Plaintiffs argue that the emotional distress claim survives under the wrongful death

statute. However, pursuant to A.R.S. § 12-611, a claim is viable under the statute only if the wrongful act or neglect supporting the underlying claim for emotional distress actually caused the death of Villanueva. Varland and Asarco conspiring to cause Villanueva severe emotional distress did not cause the death of Villanueva. Even if Villanueva suffered severe emotional distress prior to his death due to the alleged wrongful acts of Varland and Asarco, these acts supporting Plaintiffs' emotional distress claim did not kill Villanueva. If Villanueva suffered emotional distress, and that distress actually caused him to commit suicide, then the Plaintiffs would have an emotional distress claim that would survive under the wrongful death act because the resulting distress would have proximately caused Villanueva's death. However, this is not the case. The cause of Villanueva's death was a none-ton [*sic*] slab of earth that dislodged from the underground room he was working in on January 31, 2000. Under the facts of this case, although negligence in revealing Villanueva's name to Asarco may have proximately caused his death, intentionally causing Villanueva emotional distress did not contribute to his demise. To the extent that Plaintiffs allege in support of the emotional distress claim that Varland and Defendant specifically conspired to cause the death of Villanueva, these claims are distinct from the emotional distress claim and arise out of a intent to commit an assault and battery which are barred by 28 U.S.C. §2680(h). Accordingly, Defendant's motion to dismiss Plaintiff's claim for intentional infliction of emotional distress is granted.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) The Motion to Permit Supplement Opposition to Motion to Dismiss was considered and is **GRANTED**.

(2) Defendant's Motion to Dismiss all of the claims of the Olson and Vargas Plaintiffs is **GRANTED**. In addition, they shall not have the opportunity to amend their complaint. The Court may deny amendment if such amendments would be futile. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998). The Court believes that any amendments would be futile, and accordingly **DENIES** any amendments to the Olson and Vargas complaint. Pursuant to F.R.C.P. 54(b), there is no just reason for delaying a final judgment to these Plaintiffs, and as such, the **CLERK OF THE COURT** shall **ENTER A FINAL JUDGMENT** as to the Olson and Vargas Plaintiffs.

(3) Defendant's Motion to Dismiss the Villanueva Plaintiffs' claim for intentional infliction of emotional distress is **GRANTED**. Because the Court believes that any amendment of the complaint on this claim would be futile, any amendments on this claim are **DENIED**.

(4) Defendant's Motion to Dismiss the Villanueva Plaintiffs' remaining claims is **DENIED**.

DATED this 23 day of December, 2002.

/s/ WILLIAM D. BROWNING
William D. Browning
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CIV-01-663-TUC-WDB
CIV-02-323-TUC-WDB
(Consolidated)

AMPARO VILLANUEVA, ET AL., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[Filed: Dec. 26, 2002]

JUDGMENT IN A CIVIL CASE

X **DECISION BY COURT.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss all of the claims of the Olson and Vargas Plaintiffs is GRANTED. Pursuant to Rule 54(b) of the Federal Rule of Civil Procedure, there is no just reason for delay and judgment is entered in favor of defendants and against plaintiff Olson and Vargas.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss the Villanueva Plaintiffs' claim for intentional infliction of emotional distress is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion to dismiss the Villanueva Plaintiff's remaining claims is DENIED.

December 23, 2002
Date

RICHARD H. WEARE
CLERK

\s\ RENEE LUDEKE
(By) Rene Ludeke,
Deputy Clerk

Copies to: J/B

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15141
D.C. Nos. CV-01-00663-WDB
CV-02-00323-WDB

JOSEPH OLSON, HUSBAND, ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed: July 21, 2004]

ORDER

Before: B. FLETCHER, REINHARDT, Circuit Judges, and RESTANI Chief IT Judge.*

The panel has voted unanimously to deny the petition for rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge Betty Fletcher and Judge Restani so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel or en banc rehearing will be entertained.

APPENDIX D

Statutory Provisions

28 U.S.C. 1346.

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674.

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be

liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

30 U.S.C. 801.

Congressional findings and declaration of purpose

Congress declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

30 U.S.C. 811.

Mandatory safety and health standards

(a) Development, promulgation, and revision

The Secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of title 5 (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.

30 U.S.C. 813.

Inspections, investigations, and recordkeeping

(a) Purposes; advance notice; frequency; guidelines; right of access

Authorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health and Human Services may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws. For the purpose of making any inspection or investigation under this

chapter, the Secretary, or the Secretary of Health and Human Services, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health and Human Services, shall have a right of entry to, upon, or through any coal or other mine.

* * * * *

(g) Immediate inspection; notice of violation or danger; determination

(1) Whenever a reprersentative [*sic*] of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this chapter or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter. If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.

(3)

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

No. 04-759

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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February 2005

QUESTION PRESENTED

In this case, the respondents have alleged that the Mine Safety and Health Administration's failure to perform its mandatory duty to inspect a mine resulted in an accident that severely injured them.

The question presented is whether the respondents' complaint, which alleges negligence that would be actionable under the law of the state where the accident occurred if committed either by a state or municipal government or by a private entity, states a claim against the United States under the Federal Tort Claims Act.

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INTRODUCTION

This case involves only the question whether the respondents' claims against the United States under the Federal Tort Claims Act (FTCA) should survive a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). There has, as yet, been no determination that the government is liable to the respondents, let alone of the precise basis (if any) for liability.

Despite the interlocutory posture of the case, the United States has requested that this Court grant certiorari based on what it calls a "clear conflict" between the ruling of the Ninth Circuit and decisions of this Court and other courts of appeals concerning the scope of liability under the FTCA. Pet. 8. The conflict cited by the government, however, is illusory. The Ninth Circuit's precedents make clear that its approach to the FTCA is fully consistent with the general principles cited by the government and applied by other circuits. The Ninth Circuit's ruling in this case reflects only the application to a particular complaint of a very narrow doctrine originally announced 20 years ago, *at the behest of the United States*, in *Louie v. United States*, 776 F.2d 819 (9th Cir. 1985). *Louie* held that in some circumstances involving uniquely governmental functions, state laws involving governmental liability may be pertinent to the liability of the United States under the FTCA. The *Louie* doctrine has since been expressly adopted by at least two other circuits, and, perhaps more importantly, no circuit has rejected it. The fact-bound question whether the doctrine properly applies to mine safety inspections does not merit this Court's review.

Moreover, none of the precedents cited by the government conflicts with the specific holding of the Ninth Circuit in this case: namely, that a plaintiff may state a claim under the FTCA based on the violation by federal employees of a regulatory duty to conduct a mine safety inspection *where state law would make a state or municipal employee liable under like circumstances*. None of the allegedly conflicting

appellate holdings the government cites even addresses this situation, belying the government's claim that this case presents a frequently recurring issue.

In any event, deciding the issue the government poses may prove unnecessary to the resolution of this case. The Ninth Circuit did not address respondents' alternative argument that they could prevail even under the application of the "good Samaritan" standard espoused by the government, which would render the applicability of the *Louie* doctrine to this case a question of merely theoretical interest. Further factual development on remand may indicate that respondents' claims in fact satisfy the "good Samaritan" standard; or it may reveal that their claims do not pass muster even under Arizona tort principles defining the duty of care for government employees who are required to conduct safety inspections. In either event, the issue on which the government focuses will prove non-dispositive. There is certainly no urgent need to take up the issue now, on the bare pleadings and in the absence of a fully developed factual record.

STATEMENT

This case arises out of a terrible accident at the Mission Mine, an underground copper mine operated by ASARCO, Inc., in Sahuarito, Arizona, several miles south of Tucson. On January 31, 2000, respondents Joseph Olson and Javier Vargas were working with another miner, Jose Villanueva, to pack explosives into holes drilled into the ceiling of a portion of the mine, in order to blast loose additional ore-bearing rock. Because of the failure of ASARCO to provide adequate support for the mine ceiling, a nine-ton slab of rock fell from the ceiling as Olson, Vargas, and Villanueva were working. Villanueva was crushed to death, and Olson and Vargas suffered severe, disabling, and permanent injuries.

Petitioners allege that, beginning about a year before the accident, James Kirk, a field supervisor for the Mine Safety and Health Administration (MSHA) in Mesa, Arizona, had

received a series of six anonymous complaints alerting him that the Mission Mine employed inadequate measures to prevent rock falls. Although MSHA policy required him to evaluate all such complaints, later investigations by MSHA and by the Labor Department's Office of Inspector General concluded that Kirk had effectively failed to evaluate the complaints because of his mistaken belief that only signed, written complaints required evaluation.

On September 28, 1999, after Kirk had received the complaints, MSHA mine inspector Alan Varland visited the Mission Mine to conduct an inspection. MSHA is required by statute to inspect each underground mine "in its entirety" at least four times a year. 30 U.S.C. § 813(a). But petitioners allege that despite this requirement — and even though a miner told him during the inspection that ASARCO was not taking sufficient steps to prevent rock falls — Varland did not inspect all of the mine. In particular, he did not inspect parts of the mine that management had barricaded from view, only to reopen them after he left. The accident that killed Villanueva and injured respondents Olson and Vargas occurred in one of the areas that Varland did not inspect.

Olson and Vargas (and Olson's wife, respondent Monica Olson) brought this action against the United States in the U.S. District Court for the District of Arizona to recover for the injuries they suffered as a result of the accident. The complaint alleged that the United States was liable under the FTCA because the plaintiffs' injuries were the proximate result of the negligence of MSHA employees Kirk and Varland in carrying out their mandatory duties to evaluate mine safety complaints and to inspect underground mines. The complaint alleged that:

> Under the circumstances, the defendant United States would be liable under the law of the State of Arizona for personal injury if it were a private person. Alternatively, mine inspection for miner safety is a uniquely governmental activity. Under Ninth Circuit case law,

the test is whether the state or local government would be liable and in Arizona, they would.

The United States moved to dismiss the complaint, and the district court granted the motion. The court ruled, first, that respondents' complaint fell within the "discretionary function" exception to the FTCA, 28 U.S.C. § 2680(a), because the court believed that the duties respondents claimed had been violated involved the exercise of policy-related discretion by Kirk and Varland.

The district court further ruled that even if the discretionary function exception were inapplicable, the FTCA did not provide for liability because, in the court's view, respondents had failed to state a claim that would support recovery under Arizona law if the defendants were private persons. *See* 28 U.S.C. § 2674. The court noted that a private person would be liable under Arizona law for similar negligence under the "good Samaritan" doctrine as set forth in the Restatement (Second) of Torts, § 324A:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Addressing only the first and second prongs of the test, and ignoring respondents' claim that they satisfied the third prong because they had relied on MSHA's inspections to protect them, the district court held that because MSHA had not increased the risk of harm or undertaken to perform the mine owner's own duty to protect respondents, they could not state a viable claim under the Restatement standard.

The district court recognized that under Ninth Circuit precedent, the United States "may be liable under the FTCA 'for the performance of some activities that private persons do not perform,' but only when a state or municipal entity would be subject to liability under the law of the place where the activity occurred." *Concrete Tie of San Diego, Inc. v. Liberty Constr., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997) (quoting *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995)). The district court also acknowledged that under Arizona tort law, a state or local government entity could be liable for negligently performing a required safety inspection. *See Daggett v. County of Maricopa*, 770 P.2d 384 (Ariz. App. 1989); *Diaz v. Magma Copper Co.*, 950 P.2d 1165 (Ariz. App. 1997). The court, however, thought that respondents had not alleged any failure by MSHA to perform any duty that it was *required* to undertake; thus, the court concluded, respondents had not alleged any negligence that would be actionable if committed by an Arizona governmental entity.

The Ninth Circuit reversed. *Olson v. United States*, 362 F.3d 1236 (9th Cir. 2004). The court held that the discretionary function exception did not apply because respondents alleged the breach of nondiscretionary duties by MSHA employees — specifically, Kirk's failure to take the required step of evaluating all mine safety complaints and Varland's failure to inspect the mine in its entirety. The government no longer disputes this point, although the discretionary function exception was its principal defense in the courts below.

As for whether respondents had alleged a tort actionable under Arizona law, the court began with the proposition that "[g]enerally, the United States can be held liable under the FTCA only when liability would attach to a private actor under the law of the place where the tort occurred." 362 F.3d at 1240. The court did not, however, reach respondents' argument that they had stated a claim that a private party would be liable to them under like circumstances under Arizona's

"good Samaritan" doctrine because they alleged that they had relied on MSHA's inspections to protect them. Rather, the court invoked prior decisions holding that "the United States may be liable '"for the performance of some activities that private persons do not perform," ... when a state or municipal entity would be held liable under the law where the activity occurred.'" *Id.* (quoting *Concrete Tie*, 107 F.3d at 1371 (quoting *Hines*, 60 F.3d at 1448)).

Applying this principle here, the court held that there was no private-sector analogue for regulatory mine inspections because private parties lack regulatory authority; thus, such inspections were a uniquely governmental function. The court further held that under Arizona law, which strictly limits its governmental immunity doctrines, a state or municipal government could be held liable for violation of the failure to perform a mandatory mine safety inspection. *Id.* (citing *Diaz*, 950 P.2d 1165). Because respondents had alleged a breach of mandatory duties by MSHA, the court concluded that they had stated a claim under the applicable state tort law principles. *Id.* at 1241.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Opinion Does Not Conflict with Decisions of this Court or Other Circuits.

A quick review of the government's petition for certiorari leaves the reader with the impression that the Ninth Circuit's decision conflicts not only with decisions of this Court, but also of virtually every other circuit. But a closer reading reveals that the government cites *not a single conflicting precedent* that actually decided the issue addressed by the Ninth Circuit in this case: namely, whether the federal government can be held liable under the FTCA for negligent performance of a government function (here, regulatory inspections) under circumstances where a state or local government would be liable under the tort law of the state where the negligent acts were performed. The Ninth Circuit's analysis of

that issue does not conflict with the holdings of this Court's leading precedents, nor with the law of other circuits.

A. The Ninth Circuit Has Not Rejected the Teachings of *Indian Towing* and *Rayonier*.

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), this Court rejected the effort of the United States to claim *immunity* from liability under the FTCA for the performance of uniquely government activities (in that case, operation of a lighthouse). Emphasizing that "[t]he broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities like unto those in which a private person would be liable," *id.* at 68-69, the Court refused to permit the government to "import immunity back into a statute designed to limit it." *Id.* at 69. Accordingly, the Court held in *Indian Towing* that if state law permitted liability to be imposed on a private person for similar or analogous activities, the federal government could not claim immunity on the ground that a state or municipal government would be immune under state law. *Id.* at 65. The Court did *not* hold — because the question was not even remotely presented — that the federal government must be excused from liability under the FTCA in circumstances where the law of the relevant state would impose liability on a state or municipal government.

Similarly, in *Rayonier Inc. v. United States*, 352 U.S. 315 (1957), the Court rejected the federal government's effort to import state governmental immunity into the FTCA. There the plaintiffs sought to impose liability on the United States for the negligence of the Forest Service in fighting a fire on federal land in the state of Washington. The government countered by arguing that under Washington law, firefighters employed by state and local governments were immune from tort liability. The federal government claimed that same immunity even though it would be denied to private persons under Washington law.

Once again, the Court found the government's assertion of immunity to be inconsistent with what it saw as the purpose of the FTCA: "to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability." *Id.* at 319. But in holding that it would not excuse the federal government from liability based on state and local governmental immunity, the Court nowhere suggested that if state law *imposed* a duty of care on state and local governments, the federal government could escape liability by arguing that the duties of private persons under state law were narrower — an entirely different proposition (indeed, almost the opposite proposition). Any such suggestion would be hard to square with the Court's emphasis on the Act's purpose of imposing "novel and unprecedented governmental liability."

The government's assertion that the Ninth Circuit has somehow rejected the holdings of *Indian Towing* and *Rayonier* is incorrect. The Ninth Circuit's leading recent precedent on the issue, *Anderson v. United States*, 55 F.3d 1379 (9th Cir. 1995), faithfully follows *Indian Towing* and *Rayonier* in holding that the federal government is not entitled to claim state-law based governmental immunities if there is any analogous private activity for which state tort law would impose liability. *Id.* at 1381-84 (citing *Indian Towing* and *Rayonier*);[1] *see also Delta Savings Bank v. United States*, 265 F.3d 1017, 1026 (9th Cir. 2001) (finding no FTCA liability where there was no analogous state-law tort duty; citing *Indian Towing*), *cert. denied*, 534 U.S. 1082 (2002). Ninth Circuit doctrine as set forth in *Anderson* and *Delta Savings* is

[1] In light of the government's current contention that it is the *Ninth Circuit* that has ignored *Indian Towing* and *Rayonier*, it is ironic that in *Anderson*, nearly 40 years after the Court decided *Indian Towing* and *Rayonier*, the *government* was still arguing that it was entitled to immunity for precisely the same conduct at issue in *Rayonier* — fighting forest fires.

fully consistent with the precedents that the government touts as stating the correct rule, such as *Howell v. United States*, 932 F.2d 915 (11th Cir. 1991), which states that the federal government will be liable if a private person would be liable under the "closest state law analogue." *Id.* at 918.

B. The Ninth Circuit's Ruling Reflects Application of a Narrow Doctrine Created at the Behest of the United States and Accepted by Other Circuits.

In *Louie v. United States*, 776 F.2d 819 (9th Cir. 1985), the Ninth Circuit accepted the urging of the United States to create a narrow corollary to the doctrine of *Indian Towing* and *Rayonier*: in certain cases involving functions that private persons do not perform, "the inquiry into the [federal] government's liability" under the FTCA "must include an examination of the liability of state and municipal entities 'under like circumstances.'" *Id.* at 825. In *Louie*, the specific question was whether the government was liable for failing to detain an off-duty serviceman accused of drunk driving (an action that, if the government had taken it, would have prevented the serviceman from causing a fatal traffic accident). The court excused the federal government from liability because the case involved the performance of a law enforcement function, and state law would not have imposed liability on a state or municipal law enforcement agency in such circumstances. *Id.* at 825-26.

The *Louie* doctrine, originally advocated by the federal government for its own benefit, has been applied by the Ninth Circuit for twenty years. Indeed, the government invoked *Louie* successfully again in *Aguilar v. United States*, 920 F.2d 1475 (9th Cir. 1990), which held that in an FTCA action based on a federal employee's performance of law enforcement functions, the United States was entitled to the benefit of the cap on damages Nevada law imposed on tort actions against state and local police officers (even though that cap did not apply to actions against private persons). *Id.* at 1477-78 (citing *Louie*). The Ninth Circuit has also long

applied *Louie* in other cases where the analogy to state or municipal liability supports the imposition of liability on the federal government. *See Doggett v. United States*, 875 F.2d 684 (9th Cir. 1989); *Hines*, 60 F.3d 1442; *Concrete Tie,* 107 F.3d 1368. Then-Judge Kennedy endorsed the doctrine in his concurring opinion in *Gallea v. United States*, 779 F.2d 1403 (1986), where he observed that "in cases involving unique governmental functions … we seek to determine what liability state law attaches to similar activities undertaken by analogous entities subject to its jurisdiction." *Id.* at 1406-07 (Kennedy, J., concurring) (citing *Louie*).

Far from rejecting the *Louie* doctrine, other circuits have affirmatively adopted it. In *Crider v. United States*, 885 F.2d 294 (5th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990), the issue was whether the United States was liable for the consequences of a park ranger's negligent failure to make an arrest. In holding that Texas law did not impose such liability, the court examined the duties imposed on state and municipal police by Texas tort law principles. As the court explained:

> Under the special circumstances involved, we think the government got it right in *Louie*. We are not looking to state law insofar as it immunizes a public entity from liability; rather, we are seeking 'like circumstances' which best articulate a state's negligence law.

Id. at 296. The court emphasized that the application of *Louie* did not violate the principles of *Rayonier* and *Indian Towing* because it did not involve the creation of a *per se* defense or immunity based on the performance of a uniquely government function, but only resulted in an inquiry into whether state tort law recognized a *duty* in "like circumstances." *Id.* at 297.[2]

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[2] *Accord*, *Stuart v. United States*, 23 F.3d 1483, 148 (9th Cir.), *cert. denied*, 513 U.S. 947 (1994) (emphasizing that *Louie* does not import state-law immunities into the FTCA).

Similarly, in *Hetzel v. United States*, 43 F.3d 1500 (D.C. Cir. 1995), the D.C. Circuit adopted the *Louie* approach to cases involving the liability of the federal government to persons injured by federal employees engaged in law enforcement functions (specifically, in *Hetzel*, high-speed car chases). Citing Ninth Circuit precedents including *Doggett*, *supra*, the court stated:

> Other courts confronting the issue of FTCA liability in the law enforcement context have abandoned the private individual analogy and looked to the standards of care applicable to government employers under state law. … We adopt this approach.

Hetzel, 43 F.3d at 1503-04. The result in *Hetzel* (as in the case below) was federal liability, because the law of the District of Columbia imposed a duty of care on D.C. police officers in like circumstances. *See id.* at 1504-07; *see also id.* at 1507 (Williams, J., concurring).

Perhaps more telling than its express adoption by the Fifth and D.C. Circuits is that in the 20 years the *Louie* doctrine has been in existence, *no federal court of appeals has rejected it*. If the doctrine were truly as pernicious and irreconcilable with the statute, this Court's precedent, and other federal case law as the government now suggests it is, surely someone would have noticed before now. But the government cites no cases in which another court of appeals has expressed disagreement with the *Louie* doctrine, and our own searches of federal precedents have revealed no such cases.

C. The Ninth Circuit's Decision Does Not Conflict with Other Appellate Decisions That Find No Liability Under State-Law Principles for the Performance of Inspections.

The government asserts that the decision below conflicts with decisions of the Sixth and Tenth Circuits declining to impose liability on the United States for negligent MSHA inspections, and with decisions of other circuits that have

turned to state tort doctrines applicable to the activities of private persons to determine the government's liability for negligent inspections. In none of those cases, however, did the courts consider and reject imposition of liability where state tort law imposed a duty and created liability for similarly situated state or local government entities. The decisions thus are not in conflict with the outcome below. They simply reflect the inevitable consequence of a regime that makes federal liability dependent on state tort law: Outcomes of cases will vary from state to state depending on the contours of state liability principles.

The government places its principal reliance on the Sixth Circuit's decision in *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982). But *Raymer* was just a straightforward application of *Indian Towing* and *Rayonier*. The applicable state law in *Raymer* (that of Kentucky) did not impose tort duties on state or municipal inspectors similarly situated to the MSHA; it granted them an immunity, on which the United States sought to rely. *Id.* at 1140-42. Rejecting the government's argument as inconsistent with *Indian Towing* and *Rayonier*, the Sixth Circuit turned instead to the "good Samaritan" doctrine as the most analogous principle of Kentucky law, and held that on the facts before it (which had been determined through a trial in the district court) the plaintiffs did not satisfy the requirements of that standard. *Id.* at 1140-44. The court did not consider whether a state tort doctrine imposing liability on a government entity for similar inspections would support a finding of liability, because (unlike in this case) there was no such doctrine. Indeed, the court specifically noted that "no cause of action for such an omission by a governmental agency had ever been recognized in Kentucky," *id.* at 1141, an observation that suggested, consistent with the *Louie* doctrine and the decision below, that the outcome might have

been different if Kentucky had recognized such a cause of action.[3]

Similarly, in *Ayala v. United States*, 49 F.3d 607 (10th Cir. 1995), where the Tenth Circuit found no actionable breach of duty by MSHA under Colorado law, there was no Colorado authority that would have imposed liability on a state or local government authority (or on a private person) for a similar activity. *See id.* at 611-13. Indeed, in finding that Colorado law imposed no tort duty on a defendant in MSHA's position, the court placed principal reliance on Colorado cases finding that state and local government entities had no liability for failure to carry out statutorily imposed duties. *Id.* at 612 (citing *Board of County Comm'rs v. Moreland*, 764 P.2d 812, 817 (Colo. 1988) (rejecting tort remedy against county for breach of obligation to enforce building code), and *Quintano v. Indus. Comm'n*, 495 P.2d 1137, 1139 (Colo. 1972) (rejecting tort remedy against state industrial commission for breach of statutory duties)). If the government's theory were correct, of course, the Tenth Circuit should not have relied on those decisions at all, and there is nothing in the Tenth Circuit's opinion to suggest that it would disagree with the Ninth Circuit in circumstances where state law (unlike the applicable Colorado state law in *Ayala*) imposed tort duties on comparable state and local government entities.

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[3] *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), a subsequent Sixth Circuit case following *Raymer* that the government cites in passing (Pet. at 15), similarly involved circumstances where there was no analogous principle of tort liability that would be applicable to state or local government officials under Tennessee law. The only case that even arguably suggested such liability was one involving a state official's liability on a bond required by state statute, which was clearly not an appropriate analogy given the absence of such a requirement for MSHA officials. *See id.* at 900. The court in *Myers* noted that it was more relevant that Tennessee case law indicated that state and local officials were generally not liable for breach of statutory duties. *See id.* at 900 n.12.

Outside the immediately relevant context of MSHA inspections, the government also places great emphasis on two Eleventh Circuit decisions, *Howell*, 932 F.2d 915, and *Pate v. Oakwood Mobile Homes, Inc.*, 374 F.3d 1081 (11th Cir. 2004). Once again, however, the government rests its case on precedents that do not directly address the issue of whether state tort doctrines imposing duties on state and local government entities can serve as a basis for FTCA liability. In *Howell*, the court began by rejecting the notion that the government was immune from liability because it was performing a uniquely governmental function (regulating air traffic), and looked to "the closest state law analogue," which in that case was the "good Samaritan" doctrine. 932 F.2d at 918. Because there was apparently no argument that a state or local government would be liable under Georgia law for similar activities, the court did not address whether such liability could provide an appropriate "state law analogue" for FTCA purposes.

Similarly, in *Pate*, the court was not called on to decide whether the federal government would be liable under circumstances where a state or local government would be liable under Georgia law, as the only possible analogues provided by Georgia law were the "good Samaritan" doctrine or liability for failure to warn of a hazard the government itself had created (neither of which, the court held, supported liability on the facts of the particular case). 374 F.3d at 1084-87. In short, neither *Howell* nor *Pate* held that the federal government could not be held liable under circumstances where state law would impose liability on a governmental entity.

The remaining cases cited by the government (*see* Pet. at 16) are even further afield: They amount to no more than instances in which courts have quoted the language of the FTCA. None involved a holding on the issue presented here.

D. The Ninth Circuit Has Not Created a Doctrine of Liability for Breach of Federal Statutory Duties Divorced from Principles of State Tort Law.

Unable to cite appellate decisions that reject the *Louie* doctrine or conflict directly with the decision below, the government asserts that "at a broader level," the decision below is irreconcilable with "a host of decisions" holding that the FTCA does not itself create liability, independent of state tort law, for breaches of federal statutory duties. Pet. at 19. The law of the Ninth Circuit, however, is fully consistent with this principle. Indeed, a recent decision by the same judge who wrote the opinion below expressly reiterated that "[t]he breach of a duty created by federal law is not, by itself, actionable under the FTCA." *Delta Savings Bank*, 265 F.3d at 1024 (quoting *Love v. United States*, 60 F.3d 642, 644 (9th Cir. 1995)). Nothing in the decision below is to the contrary: It does not impose liability on a negligence *per se* theory for the mere violation of a federal statutory duty, but only holds that where state tort law imposes a duty on a similarly situated entity, FTCA liability may also follow. That holding is fully consistent with the fundamental principle that "the source of substantive liability under the FTCA" is "law of the State." *Id.* (quoting *FDIC v. Meyer*, 510 U.S. 471, 478 (1994)).

II. There Are No Strong Reasons to Review This Case.

The government's contention that this case presents a "recurring question of fundamental importance" (Pet. at 20) is as unpersuasive as its claims of decisional conflict. As the analysis of the case law presented above indicates, there have been very few cases where the *Louie* doctrine has been applied to impose liability on the United States because state tort law imposes liability on state and local governments in the same circumstances. That is undoubtedly because state law typically treats governmental entities *more favorably* than private persons for liability purposes. Thus, it will be the rare case where the *Louie* doctrine will result in a decision

adverse to the federal government in circumstances where the application of state tort law principles concerning private persons would not.

Moreover, as the government itself acknowledges, most cases involving the *Louie* doctrine have arisen in the context of the government's performance of law enforcement functions — and the government itself apparently continues to believe that *Louie* may appropriately be applied to such cases. *See* Pet. at 18 n.7. The reason for the government's view on that point may be that it has at least as much to gain from *Louie* in those circumstances as it has to lose, but whatever the reason for the government's position, its effort to place those cases in a separate category significantly reduces the degree to which the issue is recurring and important.

As for the government's contention that the Ninth Circuit's decision places it at the mercy of "each State's policy decisions," Pet. at 21, that is not a result of the *Louie* doctrine. Rather, it is an inherent consequence of the FTCA, which makes federal liability dependent on state tort law. *See Rayonier*, 352 U.S. at 318-20. Moreover, given the tendency of state law to be more protective of state and local governments than of private persons, the idea that the *Louie* doctrine will add significantly to the burdens already imposed on the federal government by the FTCA's incorporation of state-law liability principles is farfetched.

III. The Interlocutory Posture of the Case and the Existence of Alternative Grounds for Decision Make This Case Particularly Unsuitable for Review.

Finally, the Ninth Circuit did not rule on respondents' alternative argument that even under Arizona's "good Samaritan" doctrine as applicable to inspections conducted by private persons, they stated a claim under Restatement § 324A because they alleged reliance on the MSHA's performance of

its duties.[4] The district court, in its decision dismissing their claims, had mysteriously failed to address this allegation, which respondents had supported with sworn affidavits. Respondents' allegation of reliance is, by itself, an alternative basis for affirming the Ninth Circuit's holding that respondents' case should survive the government's motion to dismiss for failure to state a claim. Moreover, should the evidence bear out the allegation of reliance following remand to the district court for discovery and trial, the *Louie* issue would effectively drop out of this case entirely.

Of course, if respondents ultimately were to fail to prove their allegations of negligence against MSHA on remand, the *Louie* issue would also become purely academic. On the other hand, should respondents prevail in the end on the basis of the *Louie* doctrine, the issue could be reviewed by this Court (if review were otherwise warranted, which it is not) following an appeal from a final judgment. The possibility that the issue may disappear once the case proceeds to a final judgment, together with the certainty that, even if it does not disappear, decision of an important question of law would be better informed by a full factual record, strongly weighs against decision of the case at this interlocutory stage. As the United State itself is fond of pointing out:

> Even when an important threshold question has been decided by a court of appeals, this Court will "generally await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari). That customary prac-

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[4] In *Raymer*, the Sixth Circuit, following a full trial, held that the plaintiffs had not pleaded or proved reliance (660 F.2d at 1143), and in *Myers* the court also noted that the plaintiffs had not pleaded reliance. Here, by contrast, respondents have pleaded reliance, and it would be premature to conclude that there is no state of facts on which they could prevail on that ground.

tice is well-suited for the interlocutory petition in this case.

Brief for the United States as Amicus Curiae 17, *Duke University v. Madey*, No. 02-1007 (May 2003); *see also* Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (citing this Court's practice of reviewing interlocutory decisions of the federal courts of appeals only in extraordinary cases). No extraordinary circumstances compel immediate review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Date: February 2005

(2)

Supreme Court, U.S.
FILED
FEB 17 2005
OFFICE OF THE CLERK

No. 04-759

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the Federal Tort Claims Act (FTCA), the United States has waived its sovereign immunity to be sued in tort, but only to the extent that "the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). Thus, subject to additional restrictions contained in the FTCA itself, the United States' liability is defined solely by reference to the duties imposed by state law on private persons, and the United States may be held liable only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

As we demonstrate in the certiorari petition, the decision below recasts this central feature of the FTCA in a manner that cannot be reconciled with the text of the statute, this Court's decisions, or the decisions of other courts of appeals. The court of appeals held that the United States may be held liable by reference to the liability imposed on state govern-

mental entities, regardless of whether state law would place any actionable duty on private individuals in like circumstances. Pet. App. 5a-6a. The court of appeals reasoned that because Arizona has decided to make state governmental entities liable for its employees' violations of state law, the United States should, by analogy, be liable for its employees' breaches of federal law. *Id.* at 6a-7a.

Respondents make no attempt to reconcile the Ninth Circuit's decision with the text of the FTCA. Respondents seek instead to minimize the conflict between the Ninth Circuit's decision and the decisions of this Court and other courts of appeals. Br. in Opp. 6-15. Respondents acknowledge (*id.* at 7-8) that this Court has long made clear that the United States may be held liable when state law imposes liability on a private person, even if state law would not impose liability on a governmental actor. See Pet. 10-11. They also recognize (Br. in Opp. 11-13, 14) that other courts of appeals have followed those holdings in the precise context of mine inspections by the Mine Safety and Health Administration (MSHA), as well as in the context of other inspections performed by federal agencies. See Pet. 14-16, 17-18. In respondents' view, however, the ruling below can be reconciled with those other decisions because it makes the United States liable, even if state law would impose *no* liability on a private person, as long as "state law would make a state or municipal employee liable under like circumstances." Br. in Opp. 1 (emphasis omitted). That is plainly not a basis for reconciling the conflict. Neither this Court nor the other courts of appeals have suggested that the FTCA makes the United States liable in tort under *either* the liability imposed on a private individual *or* the liability imposed on a state governmental entity, as long as the route to maximum liability is selected. Such a view is irreconcilable with this Court's express recognition that the FTCA "waives the immunity of

the United States and that * * * [the Court] should not take it upon [itself] to extend the waiver beyond that which Congress intended." *Smith* v. *United States*, 507 U.S. 197, 203 (1993) (internal quotation marks omitted).

The Ninth Circuit's ruling is without any anchor in the text or purposes of the FTCA, and it visits on the United States liabilities never consented to by Congress. The decision warrants this Court's review.

A. The Decision Below Is Contrary To The Explicit Text Of The Federal Tort Claims Act And This Court's Decisions

Respondents recognize (Br. in Opp. 7-8) that this Court has already construed the FTCA provisions that subject the United States to liability based on state law duties imposed on private persons in like circumstances. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64 (1955); *Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957). Respondents assert that those decisions are fully consistent with the holding below that the United States may be subject to liability even if state law imposes *no* liability on private persons. See, *e.g.*, Br. in Opp. 6. That contention is implausible on its face and finds no support in this Court's decisions.

In *Indian Towing*, the Court specifically rejected the argument that the FTCA imposed liability on the United States "in the same manner as if it were a municipal corporation and not as if it were a private person." 350 U.S. at 65. The Court reasoned that the FTCA did not "covertly embed[]" into the FTCA "the casuistries of municipal liability for torts." *Ibid.* While in *Indian Towing*, application of the state law applicable to governmental entities would have rendered the United States immune from suit, the Court's rejection of such a rule was not based upon that result or any principle of maximizing the liability of the United States: it was based on the text of the FTCA. See *id.* at 64-65. The Court made clear

that the incorporation of governmental liability principles was "unsatisfactory" regardless of whether the outcome under a particular state's law of governmental liability would be immunity for the United States or a judgment of liability against the United States. See *id.* at 65 & n.1.

Similarly, *Rayonier*'s holding that the United States could be liable for the negligence of its firefighters was based upon the text of the FTCA, not upon a preference for rules of law that would maximize the government's liability. See 352 U.S. at 318 (noting that the "plain natural meaning" of 28 U.S.C. 1346(b) and 2674 "make[s] the United States liable to petitioners * * * if * * * Washington law would impose liability on private persons or corporations under similar circumstances"). The Ninth Circuit's embrace of a rule designed to maximize the liability of the United States would be irreconcilable with this Court's recognition that the FTCA establishes the limits of the United States' waiver of sovereign immunity—limits that must not be extended beyond the bounds established by Congress. See *Smith*, 507 U.S. at 203; *Rayonier*, 352 U.S. at 320 ("If the Act is to be altered that is a function for the same body that adopted it.").[1]

[1] Respondents distance themselves from the court of appeals' decision in this case by arguing that in other decisions, the Ninth Circuit has followed *Indian Towing* and *Rayonier* and properly applied state tort law applicable to private persons. Br. in Opp. 8-9 (citing cases). But the Ninth Circuit decisions cited by respondents do not address the issue presented here: whether the United States may be subjected to FTCA liability solely because a state subjects its own governmental entities to liability in like circumstances, regardless of whether private persons would be liable. That is the error the court of appeals made here.

B. The Ninth Circuit's Decision In This Case Conflicts With Decisions Of Other Courts Of Appeals

Respondents' attempt to discount the conflict between the Ninth Circuit and other courts of appeals fares no better.

1. As explained in the petition (Pet. 14-16), the Sixth Circuit has held that state laws pertaining to governmental liability do not apply to an FTCA claim based on the actions of federal mine inspectors. *Raymer* v. *United States*, 660 F.2d 1136, 1140-1142 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); see *Myers* v. *United States*, 17 F.3d 890, 893-894, 901 (6th Cir. 1994). Respondents suggest (Br. in Opp. 12-13) that those decisions are limited to circumstances in which state law relieves governmental entities of tort liability, and leave open the possibility that state law applicable to governmental entities could be applied if it were to *impose* liability. But the language of those decisions provides no basis for respondents' one-sided reading.

In *Raymer*, the court held that "[t]he pertinent inquiry is whether state law makes a *private individual, not the state or other political entity*, liable for an employee's failure to exercise due care under like circumstances." 660 F.2d at 1140 (emphasis added). And in *Myers*, the Sixth Circuit rejected the plaintiffs' reliance on a state case that "recogniz[ed] governmental liability when a governmental actor fails in his governmental duties," expressly concluding that "[t]he extent to which a state provides governmental liability is irrelevant * * * in an action under the FTCA, which only provides for liability 'in the same manner and to the same extent as a *private individual* under like circumstances.'" 17 F.3d at 900 (quoting 28 U.S.C. 2674) (emphasis in court of appeals' decision). The Sixth Circuit's conclusion that the extent of state governmental liability is irrelevant squarely conflicts with the decision below, which held that, far from being irrelevant, principles of governmental liability control if, like

the state case distinguished in *Myers*, they result in an imposition of liability.

In *Ayala* v. *United States*, 49 F.3d 607, 610-614 (1995), the Tenth Circuit likewise held that the United States could not be liable under the FTCA for the alleged negligence of a federal mine inspector, because it concluded that under Colorado law, a private person would not be liable under like circumstances. It is true, as respondents point out (Br. in Opp. 13), that in determining the relevant principles of Colorado tort law, the Tenth Circuit considered (among many other authorities) certain state cases involving governmental actors. 49 F.3d at 612. But the Tenth Circuit specifically "recognize[d] that the FTCA imposes liability 'to the same extent as a private individual under like circumstances,' 28 U.S.C. § 2674," and it looked to cases regarding governmental actors only because they illuminated the duty of parties, private or otherwise, "acting pursuant to a legislatively imposed obligation." *Id.* at 612 n.2. In stark contrast, the Ninth Circuit looked to principles of state governmental liability not to clarify the law that would apply to private persons, but to apply the law applicable to governmental entities *instead of* the law applicable to private persons.

Respondents also seek (Br. in Opp. 14) to minimize the conflict with still other FTCA decisions involving governmental inspections. The fact remains, however, that, insofar as we are aware, only the Ninth Circuit has applied state tort law applicable to governmental entities in such a circumstance. Every other circuit has followed the text of the FTCA and looked to the liability of private persons in like circumstances as the relevant measure of FTCA liability. See Pet. 16-18 (citing cases).

2. Respondents insist (Br. in Opp. 9-11) that no conflict exists between the Ninth Circuit's decision in *Louie* v. *United States*, 776 F.2d 819 (1985), and certain rulings of other courts

of appeals. Even if that were the case, it would not diminish the very real conflict between the decision in this case and the decisions of other circuits, both in the specific context of governmental inspections and more broadly. But in fact, the court in *Louie* did not disregard the private-person analogy. In that case, the court determined that no liability should be imposed on the United States for certain activities of law enforcement officers because state law would not have imposed liability on governmental entities. However, the court emphasized that its approach was appropriate only because under Washington law a state or municipal governmental entity is liable to the same extent as a private person. *Id.* at 825. The Court stressed that "[t]his equivalence is important because * * * a finding of immunity for state employees under state law does not determine the scope of the United States' liability under the FTCA." *Ibid.* Although the Fifth Circuit in *Crider* v. *United States*, 885 F.2d 294 (1989), cert. denied, 495 U.S. 956 (1990), purported to follow *Louie*, it did so without undertaking the equivalence determination on which *Louie* itself rested and looked instead to whether a state police officer would owe an actionable special duty to a particular member of the public in like circumstances. *Id.* at 296-298.[2]

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[2] Contrary to respondents' suggestion (Br. in Opp. 1, 9-10), the United States has repeatedly made clear in the Ninth Circuit and in other filings that it does not believe that the existence of a duty on the part of an employee of the United States can be determined by reference to duties imposed on a public officer without reference to a private-person analog. For example, in *Doggett* v. *United States*, 875 F.2d 684 (9th Cir. 1989), the United States filed an unsuccessful petition for rehearing en banc, arguing that the court should not determine the liability of federal employees by reference to the liability imposed on state and local employees, but should look to the closest private-person analog. Gov't Pet. for Reh'g at 5-14, *Doggett*, *supra* (No. 86-6019). In *Anderson* v. *United States*, 55 F.3d 1379 (9th Cir. 1995), the government did not, as respondents suggest (Br. in Opp. 8 n.1), argue that it was subject to immunity for firefighting activities; it argued that a private person would not

Furthermore, as we indicated in the certiorari petition (Pet. 18 n.7), cases involving law enforcement officers may raise distinct issues not presented here. This case involves inspections, which have a ready private analog: the liability of private workplace inspectors. See, *e.g.*, *Easter* v. *Percy*, 810 P.2d 1053 (Ariz. Ct. App. 1991); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986). Indeed other courts of appeals have applied a rule of liability for private persons, the Good Samaritan doctrine, in resolving such cases. By contrast, in many cases involving actions by police officers, there may be no "private person" analog. For these reasons, and those discussed in the petition (Pet. 18 n.7), the law enforcement cases cited by respondents (Br. in Opp. 9-11) do not bear directly on the question presented here: whether the FTCA measures the existence of an actionable duty by reference to state law applicable to private persons in like circumstances or, as the court of appeals held, to state law applicable to state or municipal entities in like circumstances. But if we assume, arguendo, that those cases are directly relevant here, they would only underscore the extent to which guidance from this Court is needed.

3. Respondents also fail in their effort (Br. in Opp. 15) to minimize the extent to which the decision below—by making the liability of the United States turn on violations of federal law, not state law—conflicts with those of other courts of appeals. See Pet. 19-20. The court of appeals concluded that

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be held liable under state law because of a state-law rule providing that no duty should be imposed on private persons performing functions similar to those of public actors where the legislature has made a policy determination to shield public actors from liability. See *id.* at 1382. And in *Crider*, the government argued that the Fifth Circuit should apply the law as it relates to private parties, but explained that it would prevail even if the court applied the state law of governmental liability. Gov't C.A. Br. at 26-31, *Crider*, *supra* (No. 88-2944).

liability should be determined by reference to Ariz. Rev. Stat. § 12-820 historical and statutory note (2003) (quoting 1984 Ariz. Sess. Laws ch. 285, § 1, at 1091-1092), which declares it "to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." Pet. App. 6a & n.1 (citing Ariz. Rev. Stat. §§ 12-820 to 12-826 (1984)). As conceived by the court of appeals, the relevant analogy is to the State's decision to make itself liable for its employees' violations of its *own* enactments, and the result is to hold the United States liable in tort for violations by federal employees of *federal* statutes or regulations. See Pet. App. 6a. Such a result is wholly contrary to the firmly-established rule that the FTCA does not apply "where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs." *Johnson* v. *Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995) (internal quotation marks omitted). Although, as respondents assert (Br. in Opp. 15), the Ninth Circuit has recited this principle in the past, its decision here flouts that principle and is thus fundamentally irreconcilable with a broad line of precedent.

C. The Question Presented Warrants Immediate Review

There is no merit to respondents' suggestion (Br. in Opp. 15-16) that this case lacks sufficient importance to warrant this Court's review. The question presented goes to the heart of the meaning and proper application of the FTCA. By ignoring Congress's express direction that the United States' liability should be based on the liability of private individuals under state law, the Ninth Circuit has fundamentally altered the nature and scope of Congress's waiver of sovereign immunity. The Ninth Circuit's decision effectively rewrites the FTCA and threatens to transform every federal law, regulation, and policy manual into a potential source of

tort liability, with no regard to whether a "private individual under like circumstances," 28 U.S.C. 2674, would have any actionable duty.

While it is true (Br. in Opp. 16-18) that the decision below is interlocutory, now is the time to review the question presented. The court of appeals defined the scope of the inquiry on remand: whether a governmental entity under like circumstances would be liable under Arizona law. The court specifically rejected the application of a "private-sector analogue." Pet. App. 5a-6a. Thus, the district court will have no warrant to consider whether the government should be held liable under a "Good Samaritan" theory. And, in any event, the Ninth Circuit's decision in this case establishes circuit precedent that will control other FTCA cases in that circuit and that conflicts with decisions of this Court and of other courts of appeals. The Court has not hesitated to review important questions about the scope of the FTCA when presented by cases in an interlocutory posture. See, *e.g.*, *United States* v. *Gaubert*, 499 U.S. 315 (1991); *United States* v. *Muniz*, 374 U.S. 150 (1963). Review by this Court therefore is warranted.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2005

Supreme Court, U.S.
FILED
APR 25 2005
OFFICE OF THE CLERK

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: DEC. 3, 2004
CERTIORARI GRANTED: MAR. 7, 2005

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 03-15141

JOSEPH OLSON, HUSBAND; MONICA OLSON, WIFE; JAVIER VARGAS, A SINGLE MAN, PLAINTIFF-APPELLANTS

v.

UNITED STATES OF AMERICA, A POLITICAL ENTITY, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
1/24/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's designation of RT is due 1/21/03,,; appellee's designation of RT is due 1/29/03; appellant shall order transcript by 2/10/03,,; court reporter shall file transcript in DC by 3/11/03,; certificate of record shall be filed by 3/18/03; appellant's opening brief is due 4/28/03,,; appellees' brief is due 5/27/03; appellants' reply brief is due 6/10/03,,; [03-15141] (dg)

DATE	PROCEEDINGS
1/24/03	Filed Civil Appeals Docketing Statement served on (to CONFATT) [03-15141] [03-15141] (dg)
1/31/03	Filed aplts' ntc of order of transcript. RT ordered 1/28/03. [03-15141] (jr)
2/13/03	Rec'd ntc of appearance of Mark B. Stern and Dana J. Martin as csl for aple. [03-15141] (jr)
2/24/03	Filed order (Deputy Clerk: bls/CONFATT) a settlement assessment conference will be held by telephone on 3/20/03 at 10:00 a.m. PACIFIC (San Francisco) Time. The brfing schedule previously set by the court remains in effect. [03-15141] (jr)
3/24/03	Filed order CONFATT (MAC) this appeal will not be selected for inclusion in the Mediation Program. [03-15141] (jr)
4/23/03	Filed motion of aplts to extend time to file opening brf until 5/26/03 and deputy clerk order (Deputy Clerk: MO) aplts' motion for an extension of time to file the opening brf is granted. [4716919-1] The opening brf is due 5/27/03. The answering brf is due 6/26/03. The optional rpy brf is due 14 days from service of the answering brf. Aplts shall monitor the issuance of the cor. (Motion recvd 4/21/03) [03-15141] (jr)

DATE	PROCEEDINGS
5/28/03	Filed certificate of record on appeal. RT filed in DC 3/10/03. [03-15141] (jr)
5/28/03	Filed original and 15 copies aplts' opening brf (Informal: no) of 27 pages & 5 copies excerpts of record in vol; served on 5/27/03. Minor defcy: no service for excerpts of record and excerpts need white covers. Notified counsel. [03-15141] (jr)
5/28/03	Filed aplts' request for oral argument; served on 5/27/03 (nan per PRO MO). [4750957] [03-15141] (jr)
6/6/03	Rec'd aplts' satisfaction of (minor) brf deficiency (proof of service for excerpts; excerpts served on 5/27/03, and white covers for excerpts). [03-15141] (jr)
6/18/03	14 day oral extension by phone of time to file Appellee USA's brief. [03-15141] appellees' brief due 7/10/03; appellants' reply brief due,, 14 days fr svc of ans br. (terr)
7/2/03	14 day oral extension by phone of time to file Appellant Joseph Olson, Appellant Monica Olson, Appellant Javier Vargas's reply brief. [03-15141] appellants' reply brief due 8/11/03,,; (terr)
7/11/03	Filed original and 15 copies aple's brief of 57 pages; served on 7/10/03. [03-15141] (ld)

DATE	PROCEEDINGS
8/12/03	Filed original and 15 copies aplts' rpy brf (Informal: no) of 23 pages; served on 8/11/03. [03-15141] (jr)
9/18/03	Calendar check performed [03-15141] (mw)
12/15/03	Rec'd Dana J. Martin's ltr dated 12/12/03 re: will not be available for argument 4/20/04 to 5/7/04 to (CALENDAR UNIT). [03-15141] (jr)
1/5/04	Calendar materials being prepared. [03-15141] [03-15141] (mw)
1/9/04	CALENDARED: SAN FRAN Mar 10 2004 0900 am Courtroom 1 [03- 15141] (aw)
2/10/04	FILED CERTIFIED RECORD ON APPEAL: 3 CLERK'S RECORDS, 1 REPORTER'S TRANSCRIPT, & 1 BULKY DOCUMENT #83. (ORIGINAL) [03-15141] (sd)
3/10/04	ARGUED AND SUBMITTED TO Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani [03-15141] (ba)
4/2/04	FILED PER CURIAM OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Betty B. FLETCHER; Stephen R. REINHARDT; Jane A. Restani.) FILED AND ENTERED JUDGMENT. [03-15141] (crw)

DATE	PROCEEDINGS
4/16/04	Filed aplts' bill of costs in the amount of $761.50; served on 4/15/04. [03-15141] (jr)
4/28/04	Filed aple's response in opposition to bill of costs; served on 4/27/04. [03-15141] (jr)
5/17/04	[5065422] Filed original and 50 copies aple's petition for panel rehearing and petition for rehearing en banc 17 pages; served on 5/14/04 to (PANEL & ALL ACTIVE JUDGES). [03-15141] (jr)
6/8/04	Filed order (Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani): Within 21 days from the date of this order, aplt shall file an orig and 50 copies of a response to aple's pet for rhrg en banc. The response shall not exceed 15 pages in length. [03-15141] (gar)
6/30/04	Filed aplts' response to aple's petition for rehearing and rehearing en banc [5065422-1]; served on 6/29/04 to (PANEL & ALL ACTIVE JUDGES). [03-15141] (jr)
7/21/04	Filed order (Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani) the petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel or en banc rehearing will be entertained. [03-15141] (jr)

DATE	PROCEEDINGS
7/29/04	MANDATE ISSUED. Aplt's bill of cost and request to file and aple's objection referred to OPERATIONS. [03-15141] (jr)
8/17/04	Filed order (Deputy Clerk: lbs/PRO MO) aplts' opposed motion for award of costs is granted in part. Costs are taxed against aple in the amount of $479.31. This order serves to amend the court's prior mdt. [03-15141] (jr)
11/15/04	Rec'd ltr from the Supreme Court dated 11/9/04 extending time to file petition for writ of certiorari to and including 12/3/04 to (PANEL). [03-15141] (jr)
12/7/04	Rec'd ntc from Supreme Court: petition for certiorari filed. Supreme Court No. 04-759 filed on 12/3/04 & placed on dkt 12/3/04 to (PANEL). [03-15141] (jr) petition for certiorari GRANTED on 3/7/05. Supreme Court No. 04-759 PANEL (crw)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. 02-CV-323

JOSEPH OLSON, HUSBAND; MONICA OLSON, WIFE; JAVIER VARGAS, A SINGLE MAN, PLAINTIFF-APPELLANTS

v.

UNITED STATES OF AMERICA, A POLITICAL ENTITY, DEFENDANT-APPELLEE

DOCKET ENTRIES*

DATE	DOCKET NUMBER	PROCEEDINGS
6/28/02	1	COMPLAINT FILED (sjd) [Entry date 07/01/02] [4:02cv323]
7/9/02	2	RETURN OF EXECUTED summons/complaint upon dft USA on 7/3/02 (sjd) [Entry date 07/10/02] [4:02cv323]
7/26/02	3	ORDERED that pla Joseph Olson, pla Monica Olson, pla Javier Vargas show cause for failure to comply with

* These docket entries contain references to a separate case brought by the family of another minor, Jose Villanueva, which the district court consolidated with respondents' case. The *Villanueva* claims are not at issue in this Court.

DATE	DOCKET NUMBER	PROCEEDINGS
		Local Rule 1.2(e); show cause hearing set for 9:30 8/12/02 for Javier Vargas, for Monica Olson, for Joseph Olson before Judge John M. Roll (cc: all counsel) (sjd) [Entry date 07/26/02] [4:02cv323]
7/31/02	4	Party agrees to mag judge jurisdiction; show cause hearing ddl satisfied 7/31/02 (sjd) [Entry date 08/01/02] [4:02cv323]
8/6/02	5	MOTION to consolidate cases by dft USA [5-1] (sjd) [Entry date 08/07/02] [4:02cv323]
8/26/02	6	Party elects assignment of case to district judge; mag election form ddl satisfied 8/26/02 (pb) [Entry date 08/26/02] [4:02cv323]
8/26/02	7	MINUTE ORDER Pursuant to Local Rule 1.2(e), a request has been received for a random reassignment of this case to a District Judge. Case reassigned by random draw to Judge William D Browning

DATE	DOCKET NUMBER	PROCEEDINGS
		(with notice sent). All further pleadings should now list the following COMPLETE case number: CIV-02-323-TUC-WDB (cc: all counsel,jcc,wdb) [7-2] (pb) [Entry date 08/26/02] [4:02cv323]
9/3/02	8	ORDER by Judge William D. Browning granting motion to consolidate cases by dft USA [5-1] Case Amparo Villanueva et al v USA CV-01-663-TUC-WDB AND Joseph Olson v USA CV-02-343-TUC-WDB are consolidated for all further proceedings; Clerk of the Court shall use CV-01-663-TUC-WDB as the LEAD case for all filings; parties shall use the above caption on all further pleadings filed in these matters (cc: all counsel) (sjd) [Entry date 09/03/02] [4:02cv323]
9/6/02	—	ORDER by Judge William D. Browning granting motion to exceed the page limit for doc(s) Memorandum in Sup-

DATE	DOCKET NUMBER	PROCEEDINGS
		port of Motion to Dismiss by dft USA in 4:01-cv-00663 [29-1] in 4:01-cv-00663 (cc: all counsel) (sjd) [Entry date 09/06/02] [4:01cv663 4:02cv323]
10/2/02	—	ORDER by Judge William D. Browning granting motion to extend time to 10/18/02 to repond to Amended Complaint by dft in 4:01-cv- 00663 [33-1] in 4:01-cv-00663 (cc: all counsel) (sjd) [Entry date 10/02/02] [4:01cv663 4:02cv323]
10/2/02	—	ORDER by Judge William D. Browning granting motion to extend time to 10/18/02 to repond to dft's motion to dismiss by plas Olson and Vargas in 4:01-cv-00663 [32-1] in 4:01-cv-00663 (cc: all counsel) (sjd) [Entry date 10/02/02] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
12/4/02	—	MINUTE ORDER setting motion to dismiss for lack of jurisdiction by dft USA in 4:01-cv-00663 [36-1] at in 4:01-cv-00663 10:30 12/12/02 in 4:01-cv-00663, in 4:02-cv-00323, setting motion to dismiss c se by dft USA in 4:01-cv-00663 [28-1] at in 4:01-cv-00663 10:30 12/12/02 in 4:01-cv-00663, in 4:02-cv-00323 (cc: all counsel) [0-1] (sms) [Entry date 12/04/02] [4:01cv663 4:02cv323]
12/26/02	—	ORDER by Judge William D. Browning granting the motion to permit supplement opposition to motion to dismiss, granting defendant's motion to dismiss all of the claims of the Olson and Vargas plaintiffs. In addition, they shall not have the opportunity to amend their complaint. The Court may deny amendment if such amendments would be futile. The Court believes that any amendments would be futile and accordingly,

DATE	DOCKET NUMBER	PROCEEDINGS
		denies any amendments to the Olson and Vargas complaint. Pursuant to FRCP 54(b) there is no just reason for delaying a final judgment as to these plaintiffs, and as such, the Clerk of the Court shall enter a final judgment as to the Olson and Vargas plaintiffs. Defendant's motion to dismiss the Villanueva plaintiffs' claim for intentional infliction of emotional distress is granted. Because the Court believes that any amendment of the complaint on this claim would be futile, any amendments on this claim are denied. Defendant's motion to dismiss the Villanueva plaintiffs' remaining claims is denied. (br) [Entry date 12/26/02] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
12/26/02	—	JUDGMENT by Judge William D. Browning: Decision by Court, ordered and adjudged that defendant's motion to dismiss all of the claims of the Olson and Vargas Plaintiffs is granted. Pursuant to Rule 54(b) of the FRCP there is no just reason for delay and judgment is entered in favor of defendants and against plaintiffs Olson and Vargas. It is further ordered that defendant's motion to dismiss the Villanueva plaintiffs' claim for intentional infliction of emotional distress is granted. Further ordered that defendant's motion to dismiss the Villanueva Plaintiff's remaining claims is denied. (cc: all counsel) (br) [Entry date 12/26/02] [4:01cv663 4:02cv323]
1/9/03	—	REPRESENTANTION STATEMENT by Joseph Olson in 4:01-cv-00663, Monica Olson in 4:01-cv-00663, Javier Vargas in 4:01-cv-00663, pla Joseph Olson in 4:02-cv-00323,

DATE	DOCKET NUMBER	PROCEEDINGS
		pla Monica Olson in 4:02-cv-00323, pla Javier Vargas in 4:02-cv-00323 re: Notice of Appeal (kt) [Entry date 01/16/03] [4:01cv663 4:02cv323]
2/28/03	—	ANSWER to complaint (amended) [24-1] in 4:01-cv-00663, complaint [1-1] in 4:02-cv-00323 by dft USA in 4:01-cv-00663, dft USA in 4:02-cv-00323 (kt) [Entry date 03/04/03] [4:01cv663 4:02cv323]
3/6/03	—	ORDER by Judge William D. Browning; prel scheduling conf set for 10:00 4/23/03 in 4:01-cv-00663, in 4:02-cv-00323 bfr Judge Browning's law clerk Kevin Rudh at 520-205-4512. Pla cnsl shall initiate the status conference by calling the law clerk with both parties on the line (cc: all counsel) (kt) [Entry date 03/06/03] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
3/10/03	—	Court Reporter's Transcript of Proceedings of PRE-TRIAL MOTIONS HEARING by Court Reporter: Melodee Horton for the following date(s): December 18, 2003 re NOTICE OF APPEAL [58- 1] in 4:01-cv-00663 (kt) [Entry date 03/18/03] [4:01cv663 4:02cv323]
4/24/03	—	SCHEDULING ORDER by Judge William D. Browning ; discovery due 10/21/03 in 4:01-cv-00663, in 4:02-cv-00323; dispositive motions due 12/22/03 in 4:01-cv-00663, in 4:02-cv-00323; Status report ddl set for 7/23/03 in 4:01-cv-00663, in 4:02-cv-00323, Joint proposed pretial order 30 days prior to trial (cc: all counsel) re: order (scheduling) [0-1] (lmf) [Entry date 04/24/03] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
4/28/039		Certified Copy of 9th Circuit Order re: Appellants' motion for an extension of time to file the opening brief is granted. The opening brief is due 5/27/03. The answering brief is due 6/26/03. The optional rply brief is due 14 days from service of the answering brief. Court records do not currently reflect that the district court has issued the certificate of record. Appellants shall monitor the issuance of the certificte (cc: judge) [9-1] (kt) [Entry date 04/29/03] [4:02cv323]
6/4/03	—	STIPULATION to extend time to respond by pla Amparo Villanueva in 4:01-cv-00663 (lmf) [Entry date 06/06/03] [4:01cv663 4:02cv323]
2/4/04	—	Clerk's record on appeal transmitted to 9th Circuit re: 1 Court case file (jkm) [Entry date 02/04/04] [4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
3/17/04	10	MINUTE ORDER, setting motion for summary judgment by dft USA in 4:01-cv-00663 [84-1] at in 4:01-cv-00663 10:00 4/12/04 in 4:01-cv-00663, in 4:02-cv-00323 (cc: all counsel) [10-3] (lmf) [Entry date 03/17/04] [Edit date 04/16/04] [4:01cv663 4:02cv323]
7/29/04	11	CERTIFIED COPY of 9th Circuit Mandate; On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this casuse be, and hereby is REVERSED AND REMANDED (cc: all counsel/ judge) [11-1] (jkm) [Entry date 08/09/04] [4:02cv323]
8/11/04	—	MOTION by pla Joseph Olson in 4:02-cv-00323, pla Javier Vargas in 4:02-cv-00323 for status conference [0-1] (lmf) [Entry date 08/12/04] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
8/17/04	13	CERTIFIED COPY of 9th Circuit Mandate (AMENDED MANDATE) Appellants' opposed motion for award of costs is granted in part. See 9th Cir. R. 39-1.1. Costs are taxed against the appellee in the amount of $479.31. Appellants are referred to Fed. R. App. P.39(e) with regard to recovering costs for transcripts. This order serves to amend the court's prior mandate. (cc: all counsel/ judge) [13-1] (jkm) [Entry date 08/25/04] [4:02cv323]
8/20/04	—	Original Record Returned from 9th Circuit re 1 original file; (jkm) [Entry date 08/20/04] [4:02cv323]
8/24/04	12	ORDER by Judge William D. Browning; prel scheduling conf set for 10:00 9/16/04 (cc: all counsel) (lmf) [Entry date 08/24/04] [4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
9/22/04	—	SCHEDULING ORDER by Judge William D. Browning ; discovery due 6/1/05 in 4:01-cv-00663, in 4:02-cv-00323; dispositive motions due 7/1/05 in 4:01-cv-00663, in 4:02-cv-00323 ; pretrial order due 8/1/05 in 4:01-cv-00663, in 4:02-cv-00323 ; Status report ddl set for 12/17/04 in 4:01-cv-00663, in 4:02-cv-00323 (cc: all counsel) re: order (scheduling) [0-1] (lmf) [Entry date 09/22/04] [4:01cv663 4:02cv323]
12/23/04	—	ORDER by Judge William D. Browning ; stay deadline set for 4:01-cv-00663, in 4:02-cv-00323 pending writ certirorari., case stayed as to (cc: all counsel) (lmf) [Entry date 12/23/04] [4:01cv663 4:02cv323]
2/15/05	—	MINUTE ORDER Case reassigned to Judge Alfredo C. Marquez (with notice sent) (cc: all counsel) [0-2] (pb) [Entry date 02/15/05] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
2/15/05	—	MINUTE ORDER It is ordered this case is reassigned to Judge Marquez. All future documents must carry the following case number and court designation CV01-663-TUC-ACM (cc: all counsel) [0-1] re: order (minute) [0-1] (lmf) [Entry date 02/15/05] [4:01cv663 4:02cv323]
3/7/05	—	ORDER by Judge Alfredo C. Marquez It is ordered this case shall be reassigned to Judge Bury; Case reassigned to Judge David C. Bury; all future documents shall carry the following case number and designation CV 01-663-TUC-DCB and CV 02-323-TUC-DCB (cc: all counsel) (lmf) [Entry date 03/07/05] [4:01cv663 4:02cv323]

DATE	DOCKET NUMBER	PROCEEDINGS
3/23/05	—	ORDER by Judge David C. Bury denying as moot motion for reconsideration of Courts Order granting stay of proceedings pending review by plaintiffs Olson and Vargas [107-1] in 4:01-cv-00663 (cc: all counsel) (kt) [Entry date 03/23/05] [Edit date 03/23/05] [4:01cv663 4:02cv323]

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV02-323TUC JCC

1. JOSEPH OLSON AND 2. MONICA OLSON, HUSBAND AND WIFE; AND 3. JAVIER VARGAS, A SINGLE MAN, PLAINTIFFS

v.

4. UNITED STATES, DEFENDANT

[Filed: June 28, 2002]

COMPLAINT
(FEDERAL TORT CLAIM)

---

1. This action arises under Title 28, United States Code, Section 2671 et seq. The Court has jurisdiction under 28 U.S.C. § 1346.

2. Venue is proper under 28 U.S.C. § 1402(b) because all acts and omissions complained of herein occurred within this district.

3. Plaintiffs Joseph and Monica Olson are husband and wife.

4. Plaintiff Javier Vargas is a single man.

5. Plaintiffs Olson and Vargas were employed as copper miners at the Mission Mine owned and operated

by Asarco Mining Company where they were seriously injured on January 31, 2000, while working in the mine.

6. Defendant United States of America, through its agency the United States Department of Labor, operates the Mine Safety and Health Administration ("MSHA"). Under the Federal Mine Safety and Health Act of 1977, MSHA is required to conduct inspections of underground mines for the purpose of, among other things, determining whether an imminent danger to the health and safety of miners exists. MSHA has the responsibility to require withdrawal of miners from any portion of a mine where an imminent danger exists.

7. Between May, 1999, and September 22, 1999, the MSHA field office in Mesa, Arizona received five anonymous telephone complaints concerning safety conditions at the Asarco Mission Mine, an underground mine in Pima County, Arizona.

8. James Kirk was the MSHA Mesa field office supervisor who answered each of the calls and received the privileged information communicated by the callers.

9. All acts and omissions complained of herein by Mr. Kirk were within the scope of his employment by the defendant United States.

10. During each of the calls, Mr. Kirk was requested to inspect the Mission Underground Mine for excessive underground heat, lack of roof bolting to prevent rock falls, and lack of ventilation. Mr. Kirk was further informed that miners who had complained about the conditions and safety violations had been subjected to illegal retaliation by Asarco.

11. Asarco's failure to employ adequate roof bolting was corroborated by files maintained by MSHA itself. These files were available to Mr. Kirk when the calls

were received. Specifically, MSHA's Safety and Health Technology Center's Roof Control Division issued a report in November, 1997, which identified weakness at the Asarco Mission Underground Mine in roof bolting and the related areas of scaling of loose rock and stabilizing of rock. MSHA knew that Asarco was resistant to bolting in the mine and had refused to follow the recommendation in the report.

12. Mr. Kirk had also received an anonymous written complaint in January, 1999, which stated that Asarco employed inadequate ground support and roof bolting at the mine, and that the company barricaded areas prior to the arrival of MSHA inspectors so that unsafe conditions would not be observed by those inspectors.

13. MSHA knew that the safety violations described in its files and reported by the callers, including the lack of roof bolting, created hazardous conditions which could kill or seriously injure Asarco Miners. Nonetheless, MSHA failed to conduct an immediate and thorough inspection of the Asarco Underground Mission Mine. The failure of James Kirk to order or conduct an immediate and thorough inspection of the Mission Underground Mine in response to the telephone complaints was a violation of a mandatory duty under MSHA procedures. That violation of a mandatory duty was a proximate cause of the injuries sustained by Plaintiffs Joseph Olson and Javier Vargas on January 31, 2000.

14. At all relevant times Alan Varland was employed as a mine inspector by MSHA. All acts and omissions complained of herein were undertaken by Mr. Varland within the scope of his employment by defendant United States.

15. On September 28, 1999, Mr. Varland was in the course of conducting a regularly scheduled inspection of the mine when a miner approached him and spoke with him. The miner complained to Mr. Varland that conditions in the mine were unsafe. He specifically stated that Asarco did not employ sufficient measures to prevent rock falls. In spite of the specific complaints, Mr. Varland did not conduct a thorough inspection of the mine. His failure to do so violated mandatory MSHA policies. His violation of mandatory MSHA policies was a proximate cause of the injuries suffered by Joseph Olson and Javier Vargas on January 31, 2000.

16. On January 31, 2000, Asarco instructed Joseph Olson and Javier Vargas to load explosives in an area of the mine known as "Stope 215 North." Asarco originally developed Stope 215 North using artificial ground support. Stope 215 North had not been mined between 1997 and 1999. When Asarco began mining ore from Stope 215 North in 1999, it changed the mining plan from "breast down mining" to "fan back stopping." The fan back stopping method used by Asarco in Stope 215 North required miners to work beneath unsupported and unstable rock ceilings.

17. On January 31, 2000, Asarco ordered Joseph Olson and Javier Vargas to work in Stope 215 North beneath an unstable rock ceiling from which the artificial ground support had been removed. That ceiling had also been subjected to drilling, blasting, and a second round of drilling. It could not be properly supported because the ore from the previous mining cycle had been mucked out and the back was too high for the ground support to be installed.

18. Joseph Olson and Javier Vargas were seriously and permanently injured on January 31, 2000, when a

nine-ton slab of rock fell from the roof of Stope 215 North.

19. The violations described herein of mandatory duties under MSHA policies and procedures caused the injuries to Joseph Olson and Javier Vargas.

20. The violations described herein of mandatory duties under MSHA policies and procedures increased the risk that Joseph Olson and Javier Vargas would be killed by falling rock at the Mission Underground Mine. Alternatively, Joseph Olson and Javier Vargas were injured because they relied on MSHA to respond to the complaints.

21. Under the circumstances, the defendant United States would be liable under the law of the State of Arizona for personal injury if it were a private person. Alternatively, mine inspection for miner safety is a uniquely governmental activity. Under Ninth Circuit case law, the test is whether the state or local government would be liable and in Arizona, they would.

22. As a result of defendant's negligence, Plaintiffs Joseph Olson and Javier Vargas suffered severe, permanent and disabling injuries.

23. As a further proximate result of defendant's negligence, Plaintiffs have expended and will expend in the future large sums of money for medical bills.

24. As a further proximate result of defendant's negligence, Plaintiffs have lost income and are likely to incur further income loss and diminished earning capacity in the future.

25. As a further proximate result of defendant's negligence, Plaintiff Monica Olson has been deprived of

the love, comfort, support and companionship of her husband, Joseph Olson.

26. As a further proximate result of defendant's negligence, Plaintiffs have suffered emotional injuries and a diminishment in enjoyment of life.

27. Plaintiffs Joseph and Monica Olson presented their claim in writing to the United States Department of labor for damages in the amount of $2,500,000. The Department of Labor denied this claim on April 24, 2002. This complaint is being filed within 6 months of the denial of the plaintiffs' tort claim.

28. Plaintiff Javier Vargas presented his claim in writing to the United States Department of Labor for damages in the amount of $2,500,000. The Department of Labor denied this claim on April 24, 2002. This complaint is being filed within 6 months of the denial of the plaintiffs' tort claim.

WHEREFORE, plaintiffs request relief as follows:

1. General and special damages in amount to be proven at trial, including but not limited to, damages for past, present and future medical expenses, loss of earnings, and an amount that will fully compensate plaintiffs for the injuries sustained and for their pain and suffering.

2. An amount to compensate plaintiff Monica Olson for her loss of consortium;

3. For such other relief as this Court deems just and proper.

DATED this 28 of June, 2002.

HARALSON, MILLER, PITT & McANALLY, P.L.C.

BY: /s/ THOMAS G. COTTER
THOMAS G. COTTER
Attorney for Plaintiffs

UNITED STATES DEPARTMENT OF LABOR
MINE SAFETY AND HEALTH ADMINISTRATION
METAL AND NONMETAL MINE SAFETY AND HEALTH

Report of Investigation
Underground Metal Mine (Copper)

Fatal Fall of Ground Accident
January 31, 2000

Mission Mine
ASARCO, Incorporated
Sahuarita, Pima County, Arizona
ID No. 02-02626

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OVERVIEW

Jose Villanueva, miner, age 59, was killed and Joseph A. Olson, Jr., miner, age 52, and Javier Vargas, operator, age 44, were seriously injured on January 31, 2000, when a slab fell from the back of a stope where they were loading blastholes.

The accident occurred because ground support had not been installed after a series of first back-lifts had been taken out. An examination and test for loose ground had not been conducted prior to work commencing.

Villanueva had a total of 37 years experience as an underground miner. He had worked at this operation for 14 months. All three miners had received training in accordance with 30 CFR Part 48.

GENERAL INFORMATION

The Mission Mine, a multi-level underground copper mine, owned and operated by ASARCO, Incorporated, was located near Sahuarita, Pima County, Arizona. The principal operating official was John D. Low, general manager. The mine was normally operated three, 8-hour shifts a day, 7 days a week. A total of 85 persons was employed; of this number 64 worked underground.

The ore body rested within a block of paleozoic-era, carbonate rocks which had been altered to skarns, locally known as tactites. These mineralized rocks were faulted into contact with unmineralized mesozoic-era argillite. Copper-bearing ore was drilled and blasted from stopes at various levels in the mine. Broken material was transported to the surface on trucks where it was dumped near the mine opening. The material was then loaded onto surface haulage trucks and transported to the mill for crushing, grinding and processing.

The last regular inspection at this operation was completed on November 23, 1999. Another inspection was conducted in conjunction with this investigation.

DESCRIPTION OF THE ACCIDENT

On the day of the accident, Jose Villanueva (victim) reported for work at 4:00 p.m., his normal starting time for the afternoon shift. He, Joseph Olson, Jr. and Javier Vargas were assigned to load blastholes in the 215-north stope, which had been drilled during the previous shift. Approximately 85 holes were to be loaded with ANFO prill blasting agent. A Getman series 2-500 ANFO loading boom truck was brought into the stope, but the back was too high, so a JLG 600S telescopic boom lift was brought in to reach the top holes. The Getman truck contained the ANFO loading equipment which included two, 1,000 pound capacity stainless steel lined ANFO pots, a vibrator and 50 feet of delivery hose.

The crew worked without unusual incident until about 8:00 p.m., when the slab fell from the back of the stope. The slab measured approximately 9-1/2 feet by 11-1/2 feet by 1-1/2 feet and weighed an estimated nine tons. It struck the boom of the JLG manlift. Villanueva and Olson were loading holes from the man basket and were jostled out. They fell approximately 20 feet to the floor. Vargas was operating the Getman prill dispenser and was injured when the slab rolled off the boom and struck him.

Louis Marrujo, shift supervisor, came to the area moments after the accident occurred. Mechanics from the surface shop and miners from other working places came to assist. Emergency medical technicians and an ambulance crew assisted the victims and prepared

them for transportation. Olson was airlifted and Vargas was taken by ambulance to a hospital in Tucson, Arizona. Villanueva was pronounced dead at the scene by the County Coroner. Death was attributed to crushing injury to the torso.

INVESTIGATION OF THE ACCIDENT

MSHA was notified at 9:30 p.m., on the day of the accident by a telephone call to Ronald Renowden, safety and health specialist, from Robert Jordan, safety administrator for the mining company. An investigation was started the next day. MSHA's investigation team traveled to the mine and made a physical inspection of the accident site, interviewed a number of persons, and reviewed documents relative to the job being performed by the victim, his co-workers and their training records. An order was issued pursuant to Section 103(k) of the Mine Act to ensure the safety of miners. The miners' representative participated in the investigation.

DISCUSSION

The accident occurred in the 215-north stope at the intersection of the L and 9 drifts. Initial development of this stope began in 1996. It had not been worked for about two years until two weeks prior to the accident. Drifts were mined typically 20 to 25 feet wide and approximately 25 feet high. Artificial ground support consisted of 8-foot long split-set friction rock stabilizers, installed in conjunction with 6-inch by 6-inch bearing plates, and 8-foot long steel mats. The split-sets were installed on roughly 4-foot by 4-foot centers with the steel mats typically oriented longitudinally down a drift. At the time of the accident, portions of the 215-north were being back stoped. This mining method

involves taking two additional lifts from the back in a previously developed stope, each about 10 to 12 feet high, leaving a final stope height of 40 to 44 feet. A series of first back-lifts was completed east of the K access drift and included the 9, 10, and L drifts, including the accident site.

The ore being mined in the 215-north stope generally consisted of hanging-wall garnet skarn bounded by footwall argillite waste rock. The rock composing the back and ribs consisted of the hanging wall high-grade garnet skarn, footwall waste argillite, an intrusive igneous dike, and a lens of waste wollastonite skarn.

Total overburden above the underground mine varied from 300 feet to 1,500 feet, depending upon location in the ore body relative to the pit wall. Overburden at the accident site was estimated to be 430 feet.

Over-mining had taken place in the 221 stope directly above the accident site. After one back-lift had been taken, sill thickness was estimated to be 36 feet at the time of the accident. Reportedly, the designed minimum sill thickness after completion of the second back-lift was 20 feet. The closest undermining to the accident site was in the 213 stope and was located below drift 10 on the 215 stope.

Prior to mining the first series of back-lifts in the 215 stope, a mechanical scaler was used to remove the steel mats from the back. Reportedly, during this process some of the split sets were also brought down. The first series of back-lifts then brought down the remaining split-sets. No split-sets were installed after the back-lifts had been taken. Stope height, measured at several locations in this area, ranged from 29 to 34 feet. At the time of the accident, about 85 blastholes were being

loaded with explosives. The holes were 1-1/2 inches in diameter and drilled to a depth of ten feet. These holes were to be the completion of the first series of back-lifts and the start of the second back-lift. Two holes for the second back-lift had been drilled through the slab that fell.

The failed slab was composed of wollastonite skarn. Maximum dimensions of the fallen slab were approximately 11-1/2 feet by 9-1/2 feet and 1-1/2 feet in thickness. The fall cavity in the back was bounded on the southeastern side by a joint striking approximately north 20 degrees to 30 degrees east and dipping approximately 70 degrees southeast. This southeastern side was the thick side (18-inches) of the failed rock. The northern and western edges of the fall cavity were feathered and did not follow any observed geological discontinuity. The northern edge appeared to coincide with the lateral extent of the wollastonite skarn. The distance that the rock broke into the back was within the wollastonite lens and did not follow any observed geological discontinuity, suggesting that the top failure surface was likely created by previous blasting of the back.

A visual inspection revealed explosives scattered throughout the accident scene and additional explosives loaded in the back. No potential source for detonation was observed and it was determined that the first step in the recovery operation was to remove the explosives that had not been loaded. Thirty holes had been loaded, primed and tied together with detonating cord. It was determined that the loaded explosives did not pose a hazard once the detonation cord was cut.

Removal of the scattered explosives from the accident scene and their return to the magazine, along with the

severing of the detonating cord from the roll and the flushing of the ANFO pots, effectively remediated the potential explosives hazards that existed at the scene.

CONCLUSION

The accident was caused by previous blasting of the back that probably loosened the slab of rock. A thorough examination and test of ground conditions had not been done prior t work activities commencing in the stope. Ground support, which had been installed during the development phase of the stope, had not been replaced in the back after being blasted out during the back-lift mining cycle. Failure to wear safety belts while working from the elevated basket likely contributed to the severity of the accident.

ENFORCEMENT ACTIONS

Order No. 7934317 was issued on January 31, 2000, under the provisions of Section 103(k) of the Mine Act:

> A serious accident resulting in a fatality to one miner and serious injuries to two others occurred at this operation on January 31, 2000, when a fall of ground occurred. This order is issued to assure the safety of persons at this operation until the mine or affected areas can be returned to normal operations as determined by an authorized representative of the Secretary. The mine operator shall obtain approval from an authorized representative for all actions to recover persons, equipment, and/or return affected area of the mine to normal operations.

This order was terminated on February 4, 2000, after it was determined that the mine could safely resume normal operations.

Citation No. 7904504 was issued on February 2, 2000, under the provisions of Section 104(d)(1) of the Mine Act for violation of 30 CFR 57.3200:

> One miner was fatally injured and two others were seriously injured at this operation on January 31, 2000, when a slab of rock fell from the back while they were working in the 215-north stope. The loose ground that created the hazard had not been taken down or supported. Failure to scale or support hazardous ground is a serious lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

This citation was terminated on April 24, 2000. The 215-north stope was abandoned and the area was barricaded and posted to prevent entry.

Order No. 7904505 was issued on February 2, 2000, under the provisions of Section 104(d)(1) of the Mine Act for violation of 30 CFR 57.3401:

> One miner was fatally injured and two others were seriously injured at this operation on January 31, 2000, when a slab of rock fell from the back while they were working in the 215-north stope. Examination and testing for loose ground had not been conducted prior to commencement of work. Failure to examine and test ground is a serious lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

This order was terminated on April 24, 2000. The 215-north stope was abandoned and the area was barricaded and posted to prevent entry.

Order No. 7904506 was issued on February 2, 2000, under the provisions of Section 104(d)(1) of the Mine Act for violation of 30 CFR 57.3360:

> One miner was fatally injured and two others were seriously injured at this operation on January 31, 2000, when a slab of rock fell from the back in the 215-north stope. Ground support had not been installed and maintained to control the ground. Failure to support ground where persons work or travel is a serious lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

This order was terminated on April 24, 2000. The 215-north stope has been abandoned and the area was barricaded and posted to prevent entry.

Order No. 7904507 was issued on February 3, 2000, under the provisions of Section 104(d)(1) of the Mine Act for violation of 30 CFR 57.15005:

> One miner was fatally injured and two others were seriously injured at this operation on January 31, 2000, when a slab of rock fell from the back while they were loading blastholes in the 215-north stope. Two of the miners were working from an elevated work basket and fell to the floor when the slab struck the boom. Safety belts and lines were not being worn. Failure to assure the use of safety belts and lines is a serious lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

This order was terminated on April 24, 2000. The mine operator has reinforced the requirements of this standard through safety meetings and training.

Related Fatal Alert Bulletin:

FAB2000M05

APPENDIX A

Persons participating in the investigation

ASARCO, Incorporated

Peter Graham, general mine supervisor (underground)
Gary Torres, mine supervisor (underground)
Tomm Heyn, corporate safety director (Tucson)
Robert Jordan, safety administrator
George Zugel, safety engineer (underground)
Gary Byers, miners' representative, International Union of Operating Engineers

Patton Boggs LLP

Mark Savit, counsel

BLM Engineering of Canada

Dave West, consultant

State of Arizona

David Hamm, chief deputy state mine inspector
Tim Evans, deputy mine inspector
Phillip Howard, assistant mine inspector

Mine Safety and Health Administration

Larry O. Weberg, supervisory mine safety and health inspector
Robert V. Montoya, mine safety and health inspector

Joseph A. Cybulski, P.E., supervisory mining engineer
Michael A. Evanto, geologist
Thomas E. Lobb, physical scientist
Michael J. Getto, physical scientist

APPENDIX B

Persons Interviewed

ASARCO, Incorporated

Peter Graham, general mine supervisor (underground)
Gary Torres, mine supervisor (underground)
George Zugel, safety engineer (underground)
Louis Marrujo, supervisor (underground)
Ralph Bejarno, miner
Joey Miller, miner
Raymond Barragan, shift mechanic
Joseph Olson, Jr., miner
Javier Vargas, operator

International Union of Operating Engineers

Gary Byers, miners' representative

[Seal Omitted]

Evaluation of Hazard Complaint Handling in MSHA's Office of Metal and Nonmetal Mine Safety and Health

Mine Safety And Health Administration

REPORT NO.: 2E-06-620-0001
DATE ISSUED: MARCH 29, 2001

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ACRONYMS AND GLOSSARY

ACRONYMS

FY	Fiscal Year
MSHA	Mine Safety and Health Administration
M/NM	Metal and Nonmetal
OIG	Office of Inspector General
POV	Pattern of Violation

GLOSSARY

miner: Any individual working in a coal or other mine.

imminent danger: Existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

representative of miner: Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and who is registered with the appropriate MSHA district.

stope: An underground excavation (usually steplike) for the removal of ore that is formed as the ore is mined in successive layers.

code-a-phone call: Hazard complaint called into MSHA headquarters on the national toll-free (1-800) telephone number and referred to the appropriate district for complaint investigation.

103(g): Section of Mine Act which specifies conditions of notification under which a miner or representative shall have (1) a right to obtain an immediate inspection and (2) a right to informal review of refusal to issue a citation with respect to alleged violation.

EXECUTIVE SUMMARY

From January through September 1999, six written and verbal hazard complaints were lodged with the Mine Safety and Health Administration's (MSHA) Mesa field office. Five of the complaints were established to have been lodged by a miner's grown daughter and a family friend, alleging unsafe conditions at the ASARCO Mission Mine. An accident subsequently occurred at the mine leaving the aforementioned miner dead and two of his colleagues permanently disabled.

MSHA, in partnership with the American mining community, works to eliminate fatalities, reduce the frequency and severity of accidents, and minimize health hazards associated with the mining industry in accordance with the Federal Mine Safety and Health Act of 1977 (Mine Act).

In August 2000, the Secretary of Labor requested the Office of Inspector General to review MSHA's activities surrounding the ASARCO Mission Mine accident, including whether:
(1) MSHA had adequate procedures and policies in place to ensure compliance with the Mine Act,
(2) those policies and procedures were followed by MSHA personnel, and (3) any necessary corrective actions have been taken.

RESULTS OF EVALUATION

During our evaluation, we found that MSHA's Division of Metal/Nonmetal can be more effective in responding to hazard complaints by improving the intake, manage-

ment, tracking, and analysis of complaints. While MSHA has already implemented changes in complaint handling since the fatal accident of January 2000, the further development of a more efficient and systematic complaint system is needed. The following findings identify our areas of concern.

FINDING A - MSHA Personnel Did Not Follow Hazard Complaint Handling and Inspection Policies and Procedures Regarding the ASARCO Mission Mine

Our evaluation determined that the MSHA Mesa field office supervisor and mine inspector did not follow various MSHA policies and procedures for at least six hazard complaints received from January through September 1999. Additionally, the inspection actions in response to these complaints were not conducted in a prompt and thorough manner. Subsequently, an accident occurred at the ASARCO Mission Mine which left one miner dead and two others permanently disabled.

FINDING B - Hazard Complaint Handling Procedures and Practices Are Not Consistent

Hazard complaint handling procedures and practices lack uniformity. This lack of uniformity is evidenced in the following areas: (1) hazard complaint intake and documentation procedures across districts and field offices, (2) complaint analysis as a management tool, (3) implementation of "best practice" procedures, and (4) nationwide training on hazard complaint procedures.

Finding C - MSHA's Policies and Guidelines on the Enforcement of the Mine Safety Act Need to Be Updated

Differences exist between the Mine Act and various MSHA policies and guidelines which interpret the Act and its accompanying regulations. These inconsistencies result in complaint handling practices frequently differing according to the interpretations of the field office supervisors and mine inspectors.

RECOMMENDATIONS

We recommend that MSHA take the following actions to improve the intake, management, tracking, and analysis of complaints. A more effective complaint process not only ensures greater accountability and public confidence but also would allow MSHA to enhance inspection activity.

Ultimately, we believe implementation of our recommendations will reduce the likelihood of the recurrence of hazard complaint handling and inspection actions similar to those surrounding the ASARCO Mission Mine accident.

Therefore, MSHA should:

(1) standardize and mandate the use of hazardous complaint handling intake, inspection and reporting forms.

(2) nationally adopt "best practices" currently used in certain districts.

(3) update and implement hazard complaint procedures to require that the mine file be reviewed by field office supervisors and mine inspectors upon receipt of a hazard complaint.

(4) develop a complaint analysis system to:

a) capture all complaints,
b) specifically track or accurately account for complaints, and
c) follow up on complaints to ensure that appropriate corrective action has been taken.

(5) further develop and update classroom training for new mine inspectors, and implement hazard complaint handling refresher courses for all journeymen mine inspectors, and for all MSHA personnel who receive hazard complaints.

(6) reconcile inconsistent language on complaint handling found between the various MSHA guidelines in accordance with the July 2000 directive.

(7) develop guidelines for district management's approval or disapproval of proposed actions on hazard complaints outside of MSHA's jurisdiction and hazard complaints deemed frivolous.

(8) establish a policy on whether and when to incorporate hazard complaints into regular inspections.

AGENCY RESPONSE AND OIG CONCLUSION

In response to OIG's official draft report, MSHA generally agreed with our findings and recommendations. MSHA provided suggested clarifications and modifications which are addressed in the findings and recommendations section of this report. As a result of corrective actions planned by MSHA, we consider all eight recommendations to be resolved. The recommen-

dations will be closed after those corrective actions are completed. The agency's complete response is found in Appendix B.

BACKGROUND

MSHA, in partnership with the American mining community, works to eliminate fatalities, reduce the frequency and severity of accidents, and minimize health hazards associated with the mining industry in accordance with the Federal Mine Safety and Health Act of 1977 (Mine Act). The Mine Act requires MSHA to inspect every underground mine four times annually and all surface mines two times annually to determine compliance with Federal safety and health regulations.

On January 31, 2000, an accident occurred at the ASARCO Mission Mine (an underground mine) in Pima County, Arizona, in which a miner with 37 years' experience was killed by a 9-ton slab of falling copper ore. The two other miners present in the area were critically injured by the rock fall.

Six Hazard Complaints Were Lodged Prior to the Accident

Prior to the accident, six written and verbal hazard complaints were lodged with MSHA's Mesa field office. The five verbal hazard complaints were lodged by that miner's grown daughter and a family friend and included charges of inadequate ground support, roof bolting and ventilation.

The first complaint, a letter dated January 25, 1999, was signed by "a concerned worker for safety of all", and was received by MSHA's Mesa field office supervisor. The letter outlined specific complaints against ASARCO Mission Mine regarding inadequate ventilation, ground support, roof bolting, and the company practice of barricading stopes before the inspector's arrival. The

Mesa field office supervisor did not assign the complaint to an MSHA inspector until six weeks later, for inclusion in a regular inspection. The inspector issued no citations.

The miner's daughter subsequently called the MSHA supervisor three times, beginning in May 1999. She did not identify herself or her father for fear of company retaliation. The miner's daughter stated that she requested that underground heat, bolting, ventilation and oxygen levels at the mine be inspected. She also reported to the Mesa field office supervisor that employees were being retaliated against for complaining about mine conditions.

When the miner's daughter felt that her complaints were being ignored by the Mesa field office supervisor, she enlisted the help of a family friend, who stated that he called the supervisor twice with the same allegations. After the last call on September 22, the field office supervisor orally passed the complaint on to the same inspector who had conducted the March 1999 inspection. Five days later (September 27), the inspector once again conducted a complaint investigation during the course of an already scheduled regular inspection, resulting in one citation for hazardous conditions (loose rock). A subsequent regularly scheduled inspection conducted in November by another mine inspector resulted in no citations.

Steps Taken By MSHA After the Accident

Beginning on February 1, 2000, a team of accident investigators from MSHA investigated the facts and conditions surrounding the accident at the ASARCO Mission Mine. Their inspection resulted in one citation and three orders issued for failure to correct hazardous

ground conditions or to examine for loose ground conditions; failure to replace previously installed ground support; and failure of miners to wear safety belts while working.

In the year 2000 after the accident, MSHA issued a total of seventeen citations related to some of the very same allegations contained in the six hazard complaints at Mission Mine. In 1999, one citation was issued in the previous year related to the hazard complaints.

An internal investigation conducted by MSHA (dated March 7, 2000) concluded that legitimate complaints were received but were not promptly investigated or properly documented. The investigation also determined that the Mesa field office supervisor failed to ensure that all complaints were handled in accordance with policy and Metal/Nonmetal procedures in place at the time of the complaints.

During May 2000, MSHA's Assistant Secretary and the Administrator for Metal/Nonmetal visited the Mesa field office to underscore the importance of responding to complaints immediately. On July 31, 2000, the Assistant Secretary issued a memorandum to all MSHA employees directing them that all complaints are to be investigated immediately irrespective of whether an official complaint was filed, and regardless of the source of the complaint. (See Appendix A.)

PURPOSE AND METHODOLOGY

On August 10, 2000, the Secretary of Labor requested the Office of Inspector General (OIG) to review MSHA's activities surrounding the January 31, 2000 accident at ASARCO Mission Mine in Pima County, Arizona. Specifically, the Secretary requested that the OIG:

> *"Review the events that occurred both before and after the accident, including whether MSHA had adequate procedures and policies in place to ensure compliance with the requirements of the Mine Safety Act, whether those policies and procedures were followed by MSHA personnel, and if not, whether corrective actions have been taken."*

PURPOSE

Our evaluation assessed the effectiveness of MSHA's complaint handling both prior and subsequent to the January 31, 2000 accident at the ASARCO Mission Mine which left one miner dead and two others permanently disabled. We reviewed complaint handling at the Mesa, Arizona field office, six Metal-Nonmetal district offices, and MSHA headquarters, in the following areas:

- whether MSHA policies and procedures were followed by MSHA personnel at the Mesa Field Office, and the adequacy of any corrective actions taken;

- whether and how effectively MSHA policies and procedures are followed by MSHA personnel nationwide; and,
- the adequacy of MSHA policies and procedures to ensure compliance with the requirements of the Mine Safety Act.

METHODOLOGY

We conducted our fieldwork on site at the MSHA National office in Arlington, Virginia; the Rocky Mountain District office; and the Denver, Colorado and Mesa, Arizona field offices with mine inspectors, field and district supervisors, and other managerial, technical and professional staff members. Our evaluation involved telephone and in-person interviews with the other five district and assistant district managers. MSHA's Directorate of Program Evaluation and Information Resources provided us with data on hazard complaint and inspection files from their Teradata database and MSHA's Metal/Nonmetal database. We reviewed a judgmental sample of actual complaint and inspection files in the Rocky Mountain district, including the Mesa field office, for the period from 1997 - 2000. Our review included related MSHA documents, such as policy and procedures, inspection and training manuals, handbooks, directives, and memoranda related to hazard complaint handling.

The detail of events surrounding the ASARCO Mission Mine fatal accident was taken from the following: court depositions of MSHA inspectors; regular inspection files including field notes; a fatality report surrounding the accident; and, an MSHA internal investigation re-

port conducted by an assistant district manager outside the Rocky Mountain district.

We conducted our evaluation in accordance with the *Quality Standards for Inspections* published by the President's Council on Integrity and Efficiency. A meeting was held on January 25, 2001, with MSHA's Division of Metal/Nonmetal to discuss our findings.

FINDINGS AND RECOMMENDATIONS

Finding A - MSHA Personnel Did Not Follow Hazard Complaint Handling and Inspection Policies and Procedures Regarding the ASARCO Mission Mine

Our evaluation determined that the MSHA Mesa field office supervisor and mine inspector did not follow various MSHA policies and procedures for at least six hazard complaints received from January through September 1999. Additionally, the inspection actions in response to these complaints were not conducted in a prompt and thorough manner. Subsequently, an accident occurred on January 31, 2000 at the ASARCO Mission Mine which left one miner dead and two others permanently disabled.

Hazard Complaint Handling

We found that MSHA's Mesa field office supervisor did not effectively follow two components of hazard complaint policies and procedures in relation to the ASARCO Mission Mine hazard complaints:

1. Determination of Who May File a Complaint
2. Determination of Imminent Danger or Health and Safety Violation

We determined that MSHA's mine inspector assigned to investigate the complaints violated MSHA policy in the following area:

3. Protecting Miner Confidentiality

We also found that the inspection actions in response to the hazard complaint allegations were not conducted in a prompt and thorough manner.

1. Determination of Who May File a Complaint

We believe that the Mesa field office supervisor improperly determined that the six complaints received were not *valid* hazard complaints.

During the period January through September 1999, a total of six hazard complaints (both written and verbal) were received by MSHA's Mesa field office supervisor. Five of these complaints were later established by MSHA to be lodged by the deceased miner's daughter and a family friend. The anonymous complaints requested that underground heat, roof bolting, ventilation and oxygen levels at the mine be inspected. These complaints alleged conditions similar to those that resulted in the miner's death.

According to MSHA's March 7, 2000 internal investigation, the Mesa field office supervisor evaluated the complaints and made the determination that these complaints were not valid because the person(s) did not identify themselves. Moreover, the mine inspector stated in sworn testimony that both he and the field office supervisor believed these were not valid complaints because the verbal complaints received by the field office supervisor were not specific enough.

The Mesa field office supervisor stated that he was acting in accordance with Section 103(g) of the Mine Act which stipulates that for official hazard complaints to be registered with MSHA, the notice shall be provided in writing and signed by a representative of miners or a miner.

> *"Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy . . . provided the operator or his agent no later than at the time of inspection, except that the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists."*—Federal Mine Safety and Health Act of 1977, section 103(g)(1).

As a result of making this determination, the field office supervisor did not document these complaints and subsequently discarded all related notes.

We believe that the specific allegations of inadequate ventilation, ground support, and improper roof bolting were valid complaints in accordance with MSHA policies and procedures. While the Mine Act is specific about the requirements of a formal hazard complaint, MSHA has further procedures for hazard complaint handling:

> *". . . Many times, complaints concerning hazardous conditions do not meet the technical requirements of Section 103(g). The health and safety of miners are best served by examining all notifications of the possible existence of hazardous conditions, even though a specific complaint may not strictly adhere to these requirements. Accordingly, all complaints of alleged hazards . . . must be evaluated. If appropriate, inspection steps must then be taken."*—MSHA General Inspection Procedures Handbook, p. 27, dated April 1989.

We concluded that the field office supervisor did not effectively evaluate the complaints in determining a course of action. We also determined that he did not act prudently in failing to document the complaints.

2. Determination of Imminent Danger or Health and Safety Violation

MSHA policies stipulate procedures for a miner or miner's representative to request an immediate mine inspection if an imminent danger exists. The Mesa field office supervisor stated that the complaints he received did not meet the threshold test of "imminent danger," and that it was indeterminable where the alleged hazardous conditions were located in the mine. Therefore, at no time did the Mesa field office supervisor assign an inspector to conduct an immediate complaint inspection *separate from and prior to* regularly scheduled inspections.

We believe that the specific allegations of inadequate ventilation, ground support, and improper roof bolting described serious hazards and merited a complete evaluation and prompt complaint inspection separate from and prior to regularly scheduled inspections. We reached this conclusion based on our review of MSHA documents and through interviews with MSHA district supervisors and managerial and technical staff at MSHA headquarters.

Furthermore, the Mesa field office supervisor could have taken additional steps before determining that the hazard complaints received posed no threat of "imminent danger" or other serious hazard. There was information available in the ASARCO Mission Mine file maintained at the Mesa office which indicated that, in November 1997, MSHA's Safety and Health Technology Center's Roof Control Division issued a report on its evaluation of ground support and mining methods at the ASARCO Mission Mine. The report identified weaknesses in the areas of scaling, roof bolting and split-set stabilizers. These issues were similar to some

of the same allegations contained in the complaints received by the Mesa field office supervisor.

Despite the fact that the information from the November 1997 report was contained in the ASARCO Mission Mine file kept in the Mesa office, we found no indication that the Mesa field office supervisor utilized this information in making the determination whether these were valid complaints.

Finally, we believe that the information contained in the written and verbal complaints were sufficiently specific regarding the name of the mine and the hazardous conditions present to warrant a timelier inspection. The Mesa field office supervisor's explanation that it was indeterminable where the alleged hazardous conditions were located in the mine was not a sufficient rationale for delaying the investigation of the complaints for as long as six weeks initially, and for failure to more effectively evaluate and document four subsequent complaint allegations.

3. Protecting Miner Confidentiality

In his court deposition, the Mesa inspector testified that he told ASARCO Mission Mine's safety engineer the source of complaints. Hence, the confidentiality of the source was in this case breached by the MSHA inspector investigating the complaints, in violation of MSHA's confidentiality policy and procedure.

MSHA policy and procedure surrounding protection of miner's confidentiality in registering and inspecting hazard complaints state:

> *"Information received about violations or hazardous conditions should be brought to the attention of the mine operator without disclosing the identity of the person(s) providing the information."*—

MSHA Program Policy Manual, Vol. III 43-1, April 1996.

Inspection Actions

We determined that MSHA's inspection actions in response to these hazard complaints and previously identified hazardous conditions at the ASARCO Mission Mine were not conducted in a prompt and thorough manner.

1. Inspection Actions in Response to Hazard Complaints

As previously stated, the Mesa field office supervisor did not assign an inspector to conduct an immediate complaint inspection separate from and prior to regularly scheduled inspections. Instead, he incorporated the written complaint (the first complaint received) into a regular inspection approximately six weeks (March 1999) after the letter dated January 25, 1999. No citations were issued as a result of that inspection.

A second regularly scheduled inspection occurred during April 1999, which yielded one citation pertaining to the allegations. Both the miner's daughter and the Mesa field office supervisor recalled that, beginning in May 1999, the Mesa field office supervisor received four additional phone calls alleging the same hazards. The Mesa field office supervisor did not document these complaints or take any action. He finally instructed his inspector to investigate the alleged conditions during a third regular inspection beginning on September 27, 1999, after receiving the sixth complaint on September 22, 1999. That inspection resulted in one citation for ground conditions (loose rock).

While there is evidence that the mine inspector, during the March 1999 inspection, inspected areas that were barricaded, we found no evidence that barricaded areas were subsequently inspected. During the course of the September 1999 regular inspection, the mine inspector did not enter areas barricaded off by ASARCO management. Another inspector, who inspected the area during a fourth regular inspection in November 1999, testified that the barricades implied that the area was too dangerous for MSHA inspectors to enter, and hence he did not inspect or cite ASARCO. He stated that he only entered areas of the mine that were actively working at the time of his inspection. These actions occurred despite the fact that the initial written complaint contained the allegation that "in the past, management have prepared, closed, chained, or burned off certain stopes prior to inspectors arrival only for workers to again be sent back to those areas a few days later to work under poor conditions."

We concluded, through our own review of inspection documents and through discussion with the MSHA official who conducted an internal investigation of the events surrounding the accident, that the inspections conducted in March, April and September, 1999 were not thorough in investigating the allegations of hazards described in the six hazard complaints.

2. Inspection Actions In Response To Previously Identified Hazardous Conditions

As previously mentioned, in November 1997, MSHA's Safety and Health Technology Center's Roof Control Division issued a report on ground support and mining methods at the ASARCO Mission Mine. The report identified weaknesses in the areas of scaling, roof bolting and split-set stabilizers. These issues were

similar to some of the same allegations contained in the six hazard complaints received by the Mesa field office supervisor. We were told by an MSHA official that the mine file does not contain any information which demonstrates that specific followup actions were taken by either Mesa field office or the District management regarding the weaknesses identified in the November 1997 report.

In the two years after the report, and prior to the accident, only three citations related to the weaknesses identified in the November 1997 report were issued to the ASARCO Mission Mine. An MSHA internal investigation report dated March 7, 2000, concluded that the recommendations contained in the November 1997 report were not being followed at the ASARCO Mission Mine.

Additionally, during FY 2000 and after the fatal accident, MSHA conducted numerous inspection activities and issued a total of seventeen citations that addressed the types of conditions referred to in both the November 1997 Safety and Health Technology Center Report and the six hazard complaints that were received. In a report dated April 27, 2000, the MSHA Safety and Health Technology Center again evaluated the ASARCO Mission Mine, as a follow-up to the January 31, 2000 Mission Mine accident. Many of the same weakness were identified as in the November 1997 report.

Corrective Actions Taken After the Accident

The Mesa field office supervisor was placed on administrative leave and in April 2000, he was transferred to the Rocky Mountain Coal Mine Health and Safety Division office in a non-supervisory position. In August, 2000, the inspector who investigated the hazard com-

plaints was sent a memorandum proposing his dismissal from MSHA for revealing the source of the complaints.

The Administrator for Metal/Nonmetal and the Assistant Secretary for MSHA visited MSHA's Mesa field office in May 2000 to underscore the importance of replying to complaints immediately. On July 31, 2000, the Assistant Secretary for MSHA issued a memorandum to all MSHA employees directing them that all complaints were henceforth to be investigated immediately, irrespective of whether an official complaint was filed, and regardless of the source of the complaint. At the Mesa field office, the Assistant Secretary's memorandum was distributed to all staff and the new procedures verbally reviewed in staff meetings. The field office supervisors mandated that all complaints received would be documented and investigated. These practices have continued to be enforced and monitored in the Mesa field office.

In summary, the MSHA Mesa field office supervisor did not effectively follow various MSHA policies and procedures for at least six hazard complaints received from January through September 1999. The MSHA Mesa mine inspector violated MSHA policies and procedures by betraying a miner's confidentiality. Additionally, the inspection actions in response to these complaints were not conducted in a prompt and thorough manner. Corrective actions taken by MSHA are positive steps towards improving hazard complaint handling and inspection policies, procedures and practices. However, as indicated in the following findings, we identified areas where additional steps can be taken.

MSHA's Response to Findings

"The report needs to specifically differentiate between the acts of the field office supervisor and the acts of the inspector. The report leads one to believe that both the supervisor and the inspector committed all three of the acts listed on page 5. In fact, the supervisor may have failed on the first two, but only the inspector failed on the third item. This point needs to be clarified."

OIG's Conclusion

The aforementioned concerns were addressed in Finding A by separating the summaries of the actions of the supervisor from those of the inspector. The facts remain unchanged.

MSHA's Response to Findings

"The report does not adequately distinguish between a Section 103(g) hazard complaint and the more common informal hazard complaints. MSHA's regulations and policies set forth procedures for responding to hazard complaints. These include complaints that meet the requirements of Section 103(g) of the Mine Act and other, more informal complaints."

OIG's Conclusion

Our discussions of 103(g) complaints and non-103(g) complaints throughout the report are accurate and should not be altered.

MSHA's Response to Findings

"The report consistently refers to six hazard complaints lodged by the family and friends of the family. In fact, the identity of the person filing the written complaint could not be verified. The identities of the persons filing the five verbal complaints are known."

OIG's Conclusion

We have clarified throughout the body of the report that only the identities of the persons filing the five verbal complaints have been verified.

MSHA's Response to Findings

"Their (inspectors') failure to find a significant hazard does not necessarily mean that they failed to conduct a thorough investigation."

OIG's Conclusion

The report clearly states how and why thorough inspections were not conducted, that the recommendations of the 1997 Technical Report were not adequately considered in inspection activity, and that the volume of citations issued is adequately separated in the report from the thoroughness of inspections.

MSHA's Response to Findings

"We agree that the complaint should have been investigated promptly; however, without additional information regarding the conditions, location in the mine and miner exposure, the supervisor could not necessarily conclude that an imminent danger existed. He determined that the complaints addressed serious issues as evidenced by his instructions to the inspectors. Under MSHA's policies, enforcement personnel who receive non-103(g) complaints that can not be concluded to be imminent danger, have a greater degree of discretion in responding to the complaints."

OIG's Conclusion

We have modified "imminent danger" to "serious hazard" on page 7.

MSHA's Response to Findings

"The conditions complained of were not the ones that caused the accident. The accident did not occur in the area referenced in the complaint. The conditions in the stope where the fatal accident occurred were completely different than the conditions during the time that the complaints were filed. When the complaints were filed, the area where the accident occurred was an inactive section . . ."

OIG's Conclusion

We have changed the wording on page 5 of the "complaints related to some of the very conditions that resulted in the miner's death" to "these complaints alleged conditions similar to those that resulted in the miner's death."

All other miscellaneous corrections/adjustments requested in MSHA's response have been incorporated into the final report.

Finding B-	Hazard Complaint Handling Procedures and Practices Are Not Consistent

Hazard complaint handling procedures and practices lack uniformity. This lack of uniformity is evidenced in the following areas: (1) hazard complaint intake and documentation procedures across districts and field offices, (2) complaint analysis as a management tool, (3) implementation of "best practice" procedures, and (4) nationwide training on hazard complaint procedures.

Hazard Complaint Intake and Documentation Vary Across Districts and Field Offices

After interviewing all six district managers and their assistant district managers, we concluded that hazard complaint intake and documentation procedures are not uniform among the six MSHA Metal/Nonmetal district offices and the different field offices within the districts. For example, most of the six districts we spoke with use some variation of a hazard complaint intake form; however, we found that this practice is not uniformly applied. In some instances, instead of using this intake form, inspectors and field supervisors simply refer to the complaint in their field notes. Important information (i.e. time, date and location of complaints) may not be captured in these notes. While MSHA does include a suggested form for the intake of hazard complaints in its program policy manual, it is not an official MSHA form. Mandatory use of the form by inspectors would have to be negotiated with the National Council of Field Labor Locals, which represents the MSHA inspectors.

Another example is the handling of the hazard complaint telephone calls which come in to the district or field offices. Most of the calls are answered by the district management or field office supervisor; occasionally the calls are answered by administrative staff, who may not be trained on complaint handling. Only one district voiced its concern that administrative staff be properly trained on complaint intake.

Finally, our review disclosed that code-a-phone complaints (the 1-800 number for hazard complaints received in the National office and forwarded to the districts) may be treated with more efficiency and thoroughness than complaints directly received by

some district and field offices. Code-a-phone complaints received from the National office are often prioritized and given immediate inspection attention, and are reported back to the National office via detailed memorandum and logged into the national code-a-phone database. The code-a-phone complaint system provides an illustration of a clearly "closed loop" system wherein complaints are tracked from intake to the results of inspection findings and reported back for tracking purposes. Ideally, all complaints received at all levels—whether from a miner at a mine, or by a field or district office—should receive the same level of scrutiny, review and documentation as a code-a-phone complaint.

Complaint Analysis Can Be Utilized As A Management Tool

We believe that MSHA can be more proactive in utilizing complaint analysis to: (a) identify any relationship between hazard complaints received and previous deficiencies reported at the mine site, and (b) identify broader areas of complaint activity (i.e., by complaint type, within the mine, within field offices and/or districts, and across time).

1. Qualitative Analysis of Complaints

The mine files contain all the regular inspections conducted in a mine, and the MSHA inspection procedures require that enforcement personnel comprehensively review it prior to conducting the first inspection after receiving the assignment. However, MSHA hazard complaint procedures do not specify that the mine file should be reviewed by field supervisors or inspectors upon receipt of a hazard complaint. We believe that hazard complaint procedures should be updated to require that the mine file be reviewed by field supervisors or inspectors upon receipt of a hazard complaint.

2. Quantitative Analysis of Complaints

Analyses of complaints are not regularly or consistently conducted by district or field offices. Our evaluation determined that complaint analysis could identify patterns and trends in complaints across field offices, particular inspector travel areas, or across years, and within mines, in a similar fashion as the current practice of monitoring Patterns of Violation (POV). In October 1990, regulations to identify mine operators who meet the criteria for a Pattern of Violation became effective. These include procedures for initial screening of mines that may be developing a Pattern of Violations; criteria for determining whether a POV exists at a mine; procedures for issuance of potential pattern notice and final pattern notice; and, procedures for termination of a Notice of POV. The pattern of violation analysis allows MSHA to decide which mines warrant further consideration by the agency, which will be issued potential notices, and allows MSHA to provide assistance to the districts where requested. A complaint analysis system could similarly be developed to aid as a management tool in monitoring and tracking complaints.

The development of a complaint analysis system should: 1) capture all complaints; 2) specifically track or accurately account for complaints; and, 3) follow up on complaints to ensure that appropriate corrective action has been taken. Examples of analyses which could be conducted could compare the volume and percentage of citations and enforcement actions which result from code-a-phone calls to the comparable figures for calls received in various district and field offices and to evaluate possible reasons for any statistically signifi-

cant differences. There may also be merit in analyzing complaints later determined to be "frivolous" to better understand where and when complaints may emanate.

"Best Practice" Procedures Are Unevenly Implemented

Our review identified a number of promising practices at the district level, which could be adopted nationwide. Two districts mandate the use of a memorandum format to "narrate" the entire sequence of events surrounding a complaint, from intake/nature of complaint to inspection, findings, and resolution. We noted that this practice was effective in documenting the process from complaint intake to enforcement action. Other districts use a memorandum format sporadically.

Additionally, our review of documents at the field level suggests that the practice varies vastly, with differences both between field offices and between different supervisors in one office during different time periods.

The Southeast District has developed a handbook which systematically details how complaints should be handled. This 35-page handbook is concise; chapters are clearly indexed for easy reference and forms and templates (included on computer disks) have been developed for complaint intake. The handbook catalogues excerpts from MSHA documents which refer to complaint handling (i.e., Section 103(g), Program Policy Manual, Inspection Manual, Field Procedures Handbook, the July 2000 Assistant Secretary's Directive and OSHA/MSHA interagency agreement). It also includes the district's own directive on how complaints are to be handled. The handbook highlights the importance of complaint handling and provides inspectors with a uniform, readily-available reference guide for complaint handling.

Our review disclosed the need for improved complaint handling forms. For example, as suggested to us by one field supervisor, M/NM may want to develop a standardized "checklist" of complaint inspection activity, as an alternative to the current practice of using a Miscellaneous Inspection checklist form.

Relatedly, MSHA should look to other customer complaint systems such as "911" and the IRS customer complaint handling systems as examples of comprehensive systems which emphasize the efficient handling of customer complaints through the identification, management, tracking and analysis of complaints.

Nationwide Training on Hazard Complaint Procedures Is Inadequate

Our review determined that the area of complaint handling is inadequately covered in both new inspector and refresher training. Training for new inspectors is held at the National Mine Health and Safety Academy in Beckley, West Virginia, for a total of twenty-four weeks. The Mine Act is covered in detail in the three-day course, "Law, Regulation and Policy," which includes a module on Complaint Handling. The curriculum for the course, which emphasizes the authority of the inspector, has not been updated for over three years. The module on Complaint Handling within that curriculum focuses on the handling of Section 103(g)(1) and (2) complaints, and has not been updated to reflect the Assistant Secretary's Directive of July 31, 2000. The complaint handling module comprises two pages out of a forty-five page training manual, and includes approximately half an hour of classroom instruction and discussion.

Our evaluation determined that training in complaint handling, including the written training module procedures, does not sufficiently address procedural issues of the evaluation, documentation and investigation of complaints. In particular, little or no emphasis is given to those complaints which may fall outside of 103(g). The training should be broadened to encompass these broader areas. Some of the field inspectors we spoke with suggested that inspectors seasoned in complaint handling be brought in to assist in that portion of the training, possibly through conducting presentations in the classroom setting. Refresher training for experienced miners, held every two years, was also reported to be lacking in addressing complaint handling. Both inspectors and field supervisors we interviewed stated the need for more refresher training on hazard complaint handling.

In summary, we found that hazard complaint handling procedures lack uniformity across districts and field offices. Increased uniformity will result in a more efficient handling of hazard complaints through the systematic evaluation, management, tracking and analysis of complaints.

RECOMMENDATIONS:

We recommend that MSHA take the following actions:

(1) standardize and mandate the use of hazardous complaint handling intake, inspection and reporting forms.
(2) nationally adopt "best practices" currently used in certain districts.
(3) update and implement hazard complaint procedures requiring that, where practicable, the mine file be reviewed by field supervisors or inspectors after receipt of a hazard complaint. An exception can be made in the event that a complaint is received at the mine.
(4) develop a complaint analysis system to:
    a) capture all complaints;
    b) specifically track or accurately account for complaints; and,
    c) follow up on complaints to ensure that appropriate corrective action has been taken.
(5) further develop and update classroom training for new mine inspectors, and implement hazard complaint handling refresher courses for all journeymen mine inspectors, and for all MSHA personnel who receive hazard complaints.

MSHA's Response to Recommendations

(1) "M/NM is currently developing standardized forms for the receipt, handling, and disposition of hazard complaints. Where possible, standard forms will be used to record the receipt of hazard complaints, however, because of the nature of our

work, many field situations will preclude the use of the forms. Once the inspector returns to the office, however, the standard forms will be completed."

(2) "A handbook, the Hazard Complaint Processing Handbook (HCPH), will be created so that M/NM management personnel and inspectors can address hazard complaints in a uniform fashion."

(3) "This recommendation will be incorporated into the HCPH, see Recommendation #2. This recommendation, however, can not be mandatory because many complaints are received in the field and access to the files is impractical."

(4) "M/NM is currently developing a system that tracks the complaint from initial notification to final resolution and ultimate closing of the complaint."

(5) "M/NM's existing program will be modified to incorporate new procedures and database use. The training will deal with processing and investigating hazard complaints, and bringing the hazard complaints to final resolution. New mine inspectors will be given the training as part of the new inspector training at the Mine Academy; journeymen inspectors will be trained at their next scheduled journeymen training session; and appropriate administrative personnel will be trained."

OIG's Conclusion

We concur with the proposed corrective actions and consider recommendations 1 through 5 resolved. The recommendations will be closed after those corrective actions are completed. In that regard, please submit a

detailed action plan and timetable for each recommendation by no later than **May 31, 2001**.

Finding C – MSHA's Policies and Guidelines on the Enforcement of the Mine Safety Act Need to Be Updated

Differences exist between the Mine Act and various MSHA policies and guidelines which interpret the Act and its accompanying regulations. These inconsistencies result in complaint handling practices frequently differing according to the interpretations of the field office supervisors and mine inspectors.

Differences Exist Between Various MSHA Policies and Guidelines

As depicted earlier in Finding A, the Mine Act specifies that complaints coming from a miner or representative of miners (registered with the district, representing at least 2 miners) are in accordance with Section 103(g) of the Mine Act. However, various MSHA guidelines differ from the definition contained in the Mine Act, each other, and the latest directive, dated July 31, 2000, issued by MSHA's Assistant Secretary. For example, MSHA's Program Policy Manual extends valid complaints as follows:

> *"A different situation exists when an inspector receives information about violations or hazards in a mine, and the information is given in an informal manner that does not meet the requirements of Sections 103(g)(1) or 103(g)(2) in that the notice is not in writing. In these situations, the inspector receiving the information must evaluate and determine a course of action, which in some cases may result in an immediate inspection, but*

> *in other cases may not."*—MSHA Program Policy Manual, Vol. III Part 43-1, dated April 1996.

In comparison, MSHA's Field Reports Procedures Handbook, limits consideration of hazard complaints to those that are filed by a representative of miners, etc.

> *"Hazard complaints are filed by a representative of miners or union officials or any miner who has reasonable grounds to believe that a violation of the Act or of a mandatory health or safety standards exists or that an imminent danger exists."* —MSHA Field Reports Procedures Handbook, p. 9-1, dated February1989.

The above excerpt is incongruous with the broader interpretation of the Policy Program Manual, as well as the spirit and intent of an earlier version of MSHA's publication, "A Guide to Miners' Rights," which stipulated that:

> *"At any time any person may, and is encouraged to, notify MSHA of any violation of the Act or safety or health standards, or of an imminent danger."*—A Guide to Miners' Rights, p. 8, reprinted 1989.

It should be noted that the FY 2000 update to the "Guide to Miners' Rights," deletes the above section and, instead limits hazard complaints to miners and miner's representatives.

Notwithstanding that differences exist between the various guidelines listed above, the inconsistency continues with the Assistant Secretary's July 2000 directive issued to all MSHA employees stating:

> *"No matter who makes the complaint or how we receive it, any complaint about a safety or health*

concern in MSHA's jurisdiction must be taken seriously. If the complainant provides enough information to identify the location and the hazard of concern, it must be promptly investigated. . . . A complaint can come from a miner, family member, or <u>any</u> concerned person . . . If someone informs you that a specific hazard exists in a specific mine, then that should be treated as a complaint."—July 31, 2000 memorandum of the Assistant Secretary for MSHA.

We believe that the July 2000 directive, while sweeping in its intent, could be further developed in procedural terms. The investigation of complaints outside of the letter of the Mine Act's sections 103(g)(1) and (2) is very important, and various MSHA policies and guidelines should be updated to reflect the latest directive. Various documents including the Program Policy Manual, the Field Reports Procedures Handbook, and the Inspection Handbook should be updated to reflect the July 2000 directive.

Furthermore, we identified certain additional written guidelines issued by the Southeast District which we believe should also be considered when updating the various MSHA guidelines. For example:

"All verbal complaints 'shall be reduced to writing' by the MSHA employee receiving the complaint . . . A verbal complaint information form is to be completed when a telephone complaint is received."—Hazard Complaints Conditions Handbook, Southeast District, Section 1, page 1, FY 2000.

The Southeast District also states its prioritization of verbal complaints as requiring equal attention to written complaints:

"Telephone and verbal complaints are general notices of alleged violations and are given the same attention and consideration as written complaints."—Hazard Complaints Conditions Handbook, Southeast District, Section V.f, page 4, FY 2000.

No comparable language on documentation or prioritization of verbal complaints exists in National-level policies and guidelines. We believe that all existing MSHA policies and guidelines should be reviewed to ensure consistency.

<u>Some Complaints Are Not Covered by the Mine Safety Act</u>

According to several MSHA district managers, the July 2000 directive is now *literally* interpreted, leaving field supervisors little room for discretion about: (1) complaints in which MSHA's jurisdiction is unclear; and, (2) complaints which can be established as "frivolous" in nature. Currently, there is no formal system for field supervisors to confer with district management in deciding, on a case-by-case basis, which complaints do not fall within MSHA's jurisdiction or are frivolous in nature.

(1) Regarding unclear jurisdiction, district managers and field supervisors now immediately inspect environmental complaints from neighborhoods adjacent to mines, i.e. excessive dust, noise, and explosion vibrations. Several district managers stated that they do not have the discretion or adequate guidelines to refer the call out to a more appropriate agency. While an exist-

ing OSHA-MSHA interagency agreement outlines enforcement guidelines on unsafe and unhealthy working conditions, OSHA's jurisdiction does not extend to environmental complaints outside of work areas.

(2) The July 2000 directive does not differentiate between "frivolous" complaints, which are now responded to immediately and not clearly distinguished from imminent danger calls. Some managers and field inspectors viewed the investigation of frivolous and even some non-imminent danger complaints as taking away from regular inspection responsibilities; yet, a literal interpretation of the July 2000 directive does not permit a distinction in the prioritization of such complaints.

We believe that guidelines should be developed to formally document district management's approval or disapproval of field offices' proposed actions surrounding environmental complaints outside of MSHA's jurisdiction and complaints deemed frivolous by both field and district offices.

MSHA Lacks a Policy on the Incorporation of Complaints into Regular Inspections

Currently, MSHA does not have a clear policy on the practice of "folding" hazard complaint inspections into regular inspections. Several district supervisors stated that, unless a miner cites a complaint during the course of a regular inspection, all written and verbal hazard complaints are to be investigated separately and issued a separate event number in MSHA's Management Information Systems. However, one district manager and his assistant voiced the concern about miner confidentiality, particularly in small mines. They felt that, in order to preserve such confidentiality, the option to fold

hazard complaints into regular inspections was a discretionary judgement which should not be unilaterally removed from MSHA policy.

The issues of timing of inspection activity and of coding complaints are also involved. If a hazard complaint about a mine comes directly to a district or field office shortly before a regularly scheduled inspection at that mine, it may be prudent to send an inspector out on the regular inspection and to simultaneously investigate the complaint. We believe MSHA should explore developing a procedure wherein hazard complaints, in *exceptional* cases and with the consultation of district supervisors, can be permitted to be folded into regular inspections. This procedure should allow for both documentation and coding of complaint activity to identify, track and monitor complaints.

We believe that differences exist between the Mine Safety Act and the various MSHA guidelines on hazard complaint handling. A review and update of existing MSHA guidelines that are consistent with the July 2000 directive will be a positive step in assuring that all hazard complaints are properly handled.

RECOMMENDATIONS:

We recommend that MSHA take the following actions:

(6) reconcile inconsistent language on complaint handling found between the various MSHA guidelines in accordance with the July 2000 directive.

(7) develop guidelines for district management's approval or disapproval of proposed actions on complaints outside of MSHA's jurisdiction and complaints deemed frivolous.

(8) establish a policy on whether and when to incorporate complaints into regular inspections.

MSHA's Response to Recommendations

(6) ". . . Any inconsistencies in MSHA's Program Policy Manual, MSHA's Inspection Procedures Handbook, and Internet postings will be reconciled in the HCPH."

(7) "This procedure is already in place for the code-a-phone complaints handled by the headquarters office and will be incorporated into the HCPH referred to earlier. Guidelines will be developed and incorporated into the HCPH for dealing with trivial hazard complaints."

(8) "M/NM will establish a procedure on whether and when to incorporate hazard complaints into regular inspections."

OIG's Conclusion

We concur with the proposed corrective actions and consider recommendations 6 through 8 resolved. The recommendations will be closed after those corrective actions are completed. In that regard, please submit a detailed action plan and timetable for each recommendation by no later than **May 31, 2001**.

APPENDIX A

July 31, 2000 Memorandum for MSHA's Assistant Secretary to all MSHA Employees Regarding Complaint Handling

[Seal Omitted]

U.S. Department of Labor

Mine Safety and
Heath Administration
4015 Wilson Boulevard
Arlington, Vrginia 22203-1984

[Dated: JUL 31 2000]

TO ALL MSHA EMPLOYEES:

This is to remind everyone in MSHA of how important it is that we recognize and respond promptly to all safety and health complaints.

No matter who makes the complaint or how we receive it, any complaint about a safety or health concern in MSHA's jurisdiction must be taken seriously. If the complaint provides enough information to identify the location and the hazard of concern, it must be promptly investigated.

In addition, if a complainant asks to be anonymous, that request must be respected.

MSHA maintains a 24-hour "Hot Line" for safety and health complaints:
telephone (804) 746-1554.

However, miners and others do not have to use the agency "Hot Line" to make a mine safety or health complaint. A complaint can be made in person, by telephone, through 'the "Hot Line," by e-mail or in writing.

A complaint can come from a miner, family member, or *any* concerned person.

The complainant does not need to say, "I am making a safety (or health) complaint." If someone informs you that a specific hazard exists in a specific mine, then that should be treated as a complaint.

If you receive a complaint, and you have not been trained to handle complaints as part of your job, then write down the information and the person's name and phone number—if provided—and *immediately* contact the appropriate district manager, the Administrator's Office of Coal Mine Safety and Health on (703) 235-9423 or the Administrator's office for Metal/Nonmetal Mine Safety and Health on (703) 235-1565 for instructions.

Regular mine inspections detect many hazards. However, the mining environment can change daily, even hourly. Sometimes the only way MSHA can learn about a potentially deadly hazard is when someone tells us about it.

Last year, MSHA responded to 783 mine safety and health complaints, and as a result many safety and health hazards were detected and corrected.

Every one of us need to be aware, to recognize and take all mine safety and health complaints seriously. Miners and their families depend on us.

Sincerely,

/s/ J. DAVITT MCATEER
J. DAVITT MCATEER
Assistant Secretary for
Mine Safety and Health

APPENDIX B

Agency Response

[Seal Omitted]

U.S. Department of Labor

Mine Safety and
Heath Administration
4015 Wilson Boulevard
Arlington, Vrginia 22203-1984

[Dated: MAR 16, 2001]

MEMORANDUM FOR JOSE M. RALLS

Assistant Inspector General
Office of Analysis, Complaints, and Evaluations

FROM: ROBERT A. ELAM /s/ Robert A. Elam
Acting Assistant Secretary for
Mine Safety and Health

SUBJECT:

Evaluation of Hazard Complaint Handling in MSHA's
Office of Metal and Nonmetal Mine Safety and Health
Report No. 2E-06-620-0001

Thank you for the opportunity to comment on your draft Report No. 2E-06-620-0001, titled "Evaluation of Hazard Complaint Handling in MSHA's Office of Metal and Nonmetal Mine Safety and Health (M/NM)." The report thoroughly addresses relevant issues.

Generally, we agree with the recommendations set forth. We believe, however, that the report should be clarified and modified as described below. We would welcome the chance to meet and explain our concerns and reasons for the recommended changes. There are sections of the report that do not accurately reflect MSHA's policies and procedures or the facts and

circumstances surrounding the accident and the events preceding the accident.

The report needs to specifically differentiate between the acts of the field office supervisor and the acts of the inspector. The report leads one to believe that both the supervisor and the inspector committed all three of the acts listed on page 5. In fact, the supervisor may have failed on the first two, but only the inspector failed on the third item. This point needs to be clarified.

The report does not adequately distinguish between a Section 103(g) hazard complaint and the more common informal hazard complaints. MSHA's regulations and policies set forth procedures for responding to hazard complaints. These include complaints that meet the requirements of Section 103(g) of the Mine Act and other, more informal complaints. In this case, there was one anonymous written complaint. The other five were verbal and did not identify the complainant, were not signed by a representative of the miners or by a miner with reasonable grounds to believe a violation existed; and did not identify the area of the mine, or in some cases the mine itself, where the hazard or violation existed. As you note in the report, inspectors were, however, dispatched to conduct regular inspections in March and September with specific instructions to look into the conditions reported. Their failure to find a significant hazard does not necessarily mean that they failed to conduct a thorough investigation.

We agree that the complaint should have been investigated promptly; however, without additional information regarding the conditions, location in the mine and miner exposure, the supervisor could not necessarily conclude that an imminent danger existed. He determined that the complaints addressed serious

issues as evidenced by his instructions to the inspectors. Under MSHA's policies, enforcement personnel who receive non-103(g) complaints that can not be concluded to be imminent danger, have a greater degree of discretion in responding to the complaints.

The conditions complained of were not the ones that caused the accident. The accident did not occur in the area referenced in the complaint. The conditions in the stope where the fatal accident occurred were completely different than the conditions during the time that the complaints were filed. When the complaints were filed, the area where the accident occurred was an inactive section. That area did not go into production until approximately two weeks before the accident at which time the first slab round was taken from the back, opening the ground that subsequently fell. During the time when the complaints were being filed, this area was roof bolted with split set bolts. This point is never mentioned in the report.

The following is a specific list of corrections we feel are needed in addition to the general statements above:

<u>Throughout the Report</u>

The report consistently refers to six hazard complaints lodged by the family and friends of the family. In fact, the identity of the person filing the written complaint could not be verified. The identities of the persons filing the five verbal complaints are known.

<u>Page 1, Paragraph 2</u>

The last sentence sounds like only three miners were working in the mine at the time of the accident. This should say that they were in the area.

Page 1, Paragraph 4

The statement that this was the first inspection at this mine by this inspector is irrelevant and should be deleted.

Page 2, Paragraph 1

MSHA did not inspect the mine in response to the accident, rather the agency investigated the facts and conditions surrounding the accident.

Page 2

The second sentence of paragraph 2 should be deleted.

Page 2, Paragraph 4

MSHA responds to complaints rather than replying to them.

Page 2

The McAteer memo mentioned in paragraph 4 was issued after the complaints had been filed and after the accident occurred. As a result, the field office supervisor could not be responsible for handling the subject complaints according to the memo's instructions. This fact should be clearly stated.

Page 4, Paragraph 2

There has only been one report issued relative to the December 1999 fatal accident.

Page 5, Item 1 - Determination of Who May File a Complaint

The second paragraph makes it sound like the supervisor knew the complaints were from the deceased miner's family and friends. The identity of the person filing the written hazard complaint has yet to be determined (see above). A statement should be included

to note that the complaints were filed anonymously. Also, the second paragraph sounds like the complaints were ignored because they were deemed not valid. In fact, the allegations were investigated on two separate occasions. This needs to be clarified.

Page 6, Paragraph 2

There is no MSHA policy requiring that anonymous verbal complaints be reduced to writing and investigated immediately unless an imminent danger exists. This page makes it sound like there is. The statement "did not properly document these complaints . . ." should be altered to delete the word properly.

Page 6, Paragraph 4

The statement that ". . . (b) . . . on a hazard complaint intake form" is not a fair statement. MSHA neither had such a form nor required the use of a form.

Page 7, Paragraph 1

The phrase ". . . presented an imminent danger. . ." be replaced with ". . . described a serious hazard." It is not possible to determine that an imminent danger exists without specifics or an investigation of the conditions. The supervisor had neither of these at his disposal.

Page 7, Paragraph 4

Should the statement ". . . disregarding the complaint." read ". . . disregarding the complaints." or are you referring to a specific complaint? More importantly, although the supervisor did not immediately investigate the complaints, he did not disregard them.

Page 8, Paragraph 1

The Inspector General accurately notes that MSHA did respond to the complaints, albeit not in a prompt manner.

Page 9, Paragraphs 1 & 2

Replace the phrase 'hazardous conditions citations' with 'citations'.

[Excerpts of Mine Safety and Health Administration General Inspection Procedures Handbook]

MSHA Handbook Series

[Seal Omitted]

United States Department of Labor
Mine and Safety and Health Administration
Metal and Nonmetal Safety and Health
April 1989

Handbook Number 89-IV-2

General Inspection Procedures

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however, that regular inspections will be made of the operations once they have begun and that during the regular inspections the inspector will look at all of the notices issued during the CAV to ensure that the conditions and practices noted have been corrected. If the correction has not been made, an appropriate citation or withdrawal order will be issued. No additional penalty, monetary or otherwise, will be proposed solely because of the previous CAV.

The inspector, in conducting the CAV, is to proceed directly to the site of the CAV and is not to conduct a regular inspection of the premises. However, should an imminent danger situation be observed, an appropriate order will be issued.

5. Special Inspections - Procedures for Processing Hazardous Conditions Complaints

   a. Processing Hazardous Conditions Complaints

      Section 103 (g) of the Act provides representatives of miners or a miner (if there is no representative of miners), the right to obtain an immediate inspection when he or she has reasonable grounds to believe that a violation of the Act or of a mandatory health or safety standard exists, or that an imminent danger exists.

      In order to invoke the procedures of Section 103 (g) (1) or (g) (2) , the complaint must be reduced to writing and must be signed by the representative of miners or by the miner. However, many times, complaints concerning hazardous conditions do not meet the technical requirements of Section 103 (g). The health

and safety of miners are best served by examining all notifications of the possible existence of hazardous conditions, even though a specific complaint may not strictly adhere to these requirements. Accordingly, all complaints of alleged hazards, both from within and outside the context of the Procedures for Processing Hazardous Conditions Complaints in 30 CFR Part 43, must be evaluated. If appropriate, inspection steps must then be taken.

[Excerpts of Mine Safety and Health Administration Program Policy Manual, Volume III]

MSHA PROGRAM POLICY MANUAL VOLUME III
PART 43

PART 43 PROCEDURES FOR PROCESSING HAZARDOUS CONDITIONS COMPLAINTS

III. 43-1 Processing Hazardous Conditions Complaints

Section 103 (g) (1) of the Mine Act stipulates procedures and requirements for a representative of the miners, or a miner, to request an immediate inspection of a mine if there are reasonable grounds to believe that a violation of a mandatory standard or an imminent danger exists in the mine. Under Section 103 (g)(1), the notice must be in writing, signed by the representative of miners, or a miner, and a copy must be given to the operator by MSHA in a manner that withholds the identity of the person giving, or involved in, the notice. MSHA instructions and regulations, under 30 CFR Part 43, exist for responding to such notices received under Section 103 (g)(1), or by code-a-phone messages. These instructions and regulations also address MSHA's response to a notice of alleged violation or imminent danger given under Section 103(g)(2). These requests or notices have normally been investigated and handled in an expeditious manner.

A different situation exists when an inspector receives information about violations or hazards in a mine, and the information is given in an informal manner that does not meet the requirements of Sections 103 (g) (1) or 103 (g) (2) in that the notice is not in writing. In

these situations, the inspector receiving the information must evaluate and determine a course of action, which in some cases may result in an immediate inspection, but in other cases may not.

Inspectors should be willing to listen to all interested parties alleging violations, imminent dangers or hazards. Otherwise, the trust and cooperation that are the foundation of an effective safety effort will not be maintained. Depending upon the circumstances, the inspector may make an immediate inspection, or may incorporate the area or practices into his or her inspection schedule for attention at a later date. Likewise, the inspector may determine that the area in question has been inspected since the alleged occurrence and, consequently, the situation does not warrant further investigation. Any subsequent action by an inspector on information received outside the context of Section 103 (g) should not be considered a 103 (g) inspection; therefore, the procedures of Part 43 would not apply.

Information received about violations or hazardous conditions should be brought to the attention of the mine operator without disclosing the identity of the person (s) providing the information.

STATE OF ARIZONA)
)
ss.)
)
COUNTY OF PIMA)

The undersigned, Javier Vargas, being first duly sworn according to law, deposes and says:

1. I am one of the plaintiffs in the case of Villanueva, et al. v. United States of America, CV01-663-TUC-WDB.

2. I worked as a miner at the ASARCO Mission Underground Mine.

3. I went to work each day with the understanding that the MSHA inspectors were supposed to inspect the ASARCO Mine with the goal of making the mine a safe place for me and other miners to work. I relied on that fact, as well as the assumption that the inspectors had expertise and would use it to exercise reasonable safety practices.

Dated this 18th day of October, 2002.

/s/ JAVIER B. VARGAS
JAVIER B. VARGAS

SUBSCRIBED AND SWORN to before me this 18th day of October, 2002, by Javier Vargas.

/s/ DANIELLE R. BORDEN
DANIELLE R. BORDEN
Notary Public

My Commission Expires:

[SEAL OMITTED]

STATE OF ARIZONA)
)
ss.)
)
COUNTY OF PIMA)

The undersigned, Joseph Olson, being first duly sworn according to law, deposes and says:

1. I am one of the plaintiffs in the case of Villanueva, et al. v. United States of America, CV01-663-TUC-WDB.

2. I worked as a miner at the ASARCO Mission Underground Mine.

3. I went to work each day with the understanding that the MSHA inspectors were supposed to inspect the ASARCO Mine with the goal on making the mine a safe place for me and other miners to work. I relied on that fact, as well as the assumption that the inspectors had expertise and would use it to exercise reasonable safety practices.

Dated this 18 day of October, 2002.

/s/ JOSEPH OLSON, JR.
JOSEPH OLSON, JR.

SUBSCRIBED AND SWORN to before me this 18th day of October, 2002, by Joseph Olson.

/s/ DANIELLE R. BORDEN
DANIELLE R. BORDEN
Notary Public

My Commission Expires:

[SEAL OMITTED]

Supreme Court, U.S.
FILED
APR 25 2005

No. 04-759

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the liability of the United States under the Federal Tort Claims Act with respect to safety inspections is the same as that of private individuals under like circumstances or, as the Ninth Circuit held, the same as that of state and municipal entities under like circumstances.

PARTIES TO THE PROCEEDING

Petitioner is the United States of America. Respondents are Joseph Olson, Monica Olson, and Javier Vargas.

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In the Supreme Court of the United States

No. 04-759

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 362 F.3d 1236. The opinion of the district court (Pet. App. 8a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2004. A petition for rehearing was denied on July 21, 2004 (Pet. App. 34a-35a). On October 7, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 18, 2004, and on November 9, 2004, Justice O'Connor further extended the time to and including December 3, 2004. The petition for a writ of certiorari was filed on December 3, 2004, and the petition was

granted on March 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth in the appendix to the petition. Pet. App. 36a-41a.

STATEMENT

1. a. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States for torts of federal employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). Congress vested the federal district courts with exclusive jurisdiction to hear such tort claims, *ibid.*, and provided that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The FTCA contains several exceptions to this limited waiver of sovereign immunity. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1) (incorporating "the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.*).

b. The Federal Mine Safety and Health Act of 1977 (Mine Act or Act), 30 U.S.C. 801 *et seq.*, establishes a comprehensive scheme designed to promote the health and safety of the Nation's miners and improve working conditions in the Nation's mines. Pursuant to the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration (MSHA), promulgates health and safety standards for coal and other mines. See 30 U.S.C. 811(a). The Mine Act places responsibility for compliance with health and safety regulations upon the mine operator. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the

assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"); 30 U.S.C. 801(g)(2) ("[I]t is the purpose of this chapter * * * to require that each operator of a coal or other mine and every miner in such mine comply with such [mandatory health or safety] standards.").

The Mine Act requires MSHA to perform "frequent inspections and investigations in coal or other mines each year" for several purposes, including to determine whether an imminent danger exists and whether the mine operator is complying with the Act. 30 U.S.C. 813(a). MSHA is required to make inspections of each underground mine "in its entirety at least four times a year." *Ibid.* The Act also provides for "an immediate inspection" by MSHA when a miner or a representative of miners provides a written and signed notice that there are "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." 30 U.S.C. 813(g)(1).

2. a. According to the allegations in the complaint filed in federal district court, respondent miners Joseph Olson and Javier Vargas were seriously injured on January 31, 2000, in a mining accident at the Mission Underground Mine, a copper mine in Arizona that is owned and operated by Asarco Mining Company. J.A. 22-23; Pet. App. 9a. The respondent miners were loading explosives in an area of the mine known as "Stope 215 North." J.A. 25. Stope 215 North was being mined by a "fan back stoping" method, which involved drilling holes in the ceiling of an underground room, then placing explosives in the holes to blast loose pieces from the ceiling. *Ibid.*; Pet. App. 9a. The method used in

Stope 215 North "required miners to work beneath unsupported and unstable rock ceilings." J.A. 25.

On the date of the accident, Asarco had instructed Olson and Vargas to work below unstable rock from which artificial ground support had been removed. J.A. 25. That ceiling had been subjected to drilling, blasting, and a second round of drilling. It could not be properly supported because the ore from the previous mining cycle had been removed and the back was too high for ground support to be installed. *Ibid.* The respondent miners were injured when a slab of rock weighing nine tons fell from the ceiling of Stope 215 North. J.A. 25-26.

Respondents allege that, about a year before the accident, in January 1999, MSHA Supervisor James Kirk, who was stationed in the Mesa, Arizona Field Office, received an anonymous written complaint alleging that Asarco used inadequate ground support and roof bolting in its Mission Mine. J.A. 23-24. That complaint asserted that the company barricaded areas to prevent federal inspectors from observing unsafe conditions. J.A. 24. Between May and September of 1999, Kirk also received five anonymous telephone calls complaining about safety conditions at the Mission Mine. J.A. 23. The callers asked that the mine be inspected for several conditions, including lack of roof bolting to prevent rock falls. *Ibid.* The callers also asserted that Asarco had retaliated against miners who complained about unsafe conditions. *Ibid.* Respondents allege that despite those complaints, Kirk did not order or conduct "an immediate and thorough inspection" of the mine. J.A. 24.

During a regularly scheduled inspection of the Mission Mine in September 1999, MSHA inspector Alan Varland was approached by a miner who complained about unsafe conditions. J.A. 24-25. Respondents

allege that, although the miner asserted that Asarco did not use sufficient measures to prevent rock falls, the inspector did not conduct a thorough inspection for those conditions. J.A. 25.

b. In June 2002, Olson, his wife Monica Olson, and Vargas (respondents) sued the United States under the Federal Tort Claims Act, alleging that MSHA had been negligent in its inspection of the mine and that the United States therefore is liable for the injuries the miners suffered in the January 2000 accident. Pet. App. 1a-2a. Respondents' claims for negligence were based on the allegations that (1) Kirk failed to evaluate and act sufficiently upon the six anonymous complaints he received between May and September 1999 regarding safety hazards at the mine; and (2) Varland failed to inspect the mine thoroughly in September 1999. *Id.* at 2a. The United States moved, under Federal Rules of Civil Procedure 12(b)(1) and (6), to dismiss respondents' complaint for lack of subject matter jurisdiction and failure to state a claim. Pet. App. 8a.

3. The district court granted the government's motion to dismiss for two independent reasons.

a. The district court held that respondents' allegations failed to state a claim for tort liability under the law of the place where the allegedly tortious acts or omissions occurred, *i.e.*, under Arizona law. Pet. App. 22a-25a. The court noted that the liability of the United States under the FTCA is defined by the liability imposed by state law upon a private person in like circumstances, and that "even if a specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes comparable liability for private persons." *Id.* at 13a (citing *Zabala Clemente* v. *United States*, 567 F.2d

1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978)).

The court determined that negligent inspection claims in Arizona are governed by Sections 323 and 324A of the Restatement (Second) of Torts (1965) (Restatement), which set forth the "Good Samaritan" doctrine. That doctrine describes the contours of the tort liability of one "who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection" of the other person or a third person. Pet. App. 23a-24a. Under the Restatement, such a person is liable to another or a third person for his negligence only if "his failure to exercise [reasonable] care increases the risk of [physical] harm," or "the harm is suffered because of reliance of the other or the third person upon the undertaking," or, with respect to an injured third person, "he has undertaken to perform a duty owed by the other to the third person." *Ibid.* (quoting Restatement § 324A, at 142). Applying those principles, the district court held that respondents failed to state a claim under the Good Samaritan doctrine, because respondents alleged "no facts that could support a finding that MSHA's decisions increased the risk of harm to them or that MSHA undertook a duty that Asarco owed to them." *Id.* at 24a. In so holding, the district court relied upon decisions of two courts of appeals that had reached the same conclusion by applying the Good Samaritan doctrine in cases involving MSHA inspections. *Ibid.* (citing *Myers* v. *United States*, 17 F.3d 890, 903 (6th Cir. 1994); *Raymer* v. *United States*, 660 F.2d 1136 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *Ayala* v. *United States*, 49 F.3d 607, 611-614 (10th Cir. 1995)).

The district court observed that the Ninth Circuit "has created an exception to [the] rule" that FTCA liability is generally limited to "occasions in which a private person would be liable in the law of the place where the activity occurred." Pet. App. 24a-25a. Under that exception, the district court explained, the United States may be liable for activities that private persons do not perform if "a state or municipal entity would be subject to liability under the law of the place where the activity occurred." *Id.* at 25a. Concluding that "private parties do not have regulatory authority to perform mine safety inspections," *ibid.*, the court therefore considered whether "an Arizona state or municipal entity would be subject to liability for negligent inspection of a mine." *Ibid.* Although the court understood Arizona law potentially to expose an Arizona governmental entity to liability for failing to perform a mandatory safety inspection, *ibid.*, the court held that respondents failed to state a claim in this case under that theory because they "failed to identify a statute or regulation that required MSHA to conduct an immediate inspection of the Mission Mine in response to the anonymous complaints or a mandatory regulation relating to the level of scrutiny of any MSHA mine inspection and subsequent enforcement." *Ibid.*

b. The district court also held that respondents' claims were barred by the discretionary function exception to the FTCA, which provides that the United States is not liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Pet. App. 15a-22a. With respect to

Kirk's response to the six anonymous complaints, the district court determined, based on a report by the Department of Labor's Office of the Inspector General that was submitted by respondents, that Kirk did evaluate the complaints in accordance with MSHA policy, see *id.* at 16a-17a, and that his determination regarding whether to order an immediate inspection was a discretionary decision susceptible to policy analysis. See *id.* at 18a-21a. With respect to the adequacy of Varland's inspection of the Mission Mine in September 1999, the district court concluded that Varland had wide discretion in determining the scope of his inspection and whether to issue citations. See *id.* at 21a-22a.

c. The district court subsequently entered judgment, under Federal Rule of Civil Procedure 54(b), for the United States on respondents' complaint. Pet. App. 32a.[1]

4. The court of appeals reversed and remanded. Pet. App. 1a-7a.

a. The court of appeals declined to apply the principles of Arizona tort law, under the Good Samaritan doctrine, that are applicable to private persons who conduct inspections. Pet. App. 5a-6a. The court justified its rejection of that body of state law on the ground that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" *Ibid.* (brackets added by court of appeals; citations omitted). Instead, the court decided that Arizona tort law applicable to governmental entities should be applied, identifying the relevant question as "whether, under Arizona law, state and municipal entities would be liable under like circumstances." *Id.* at 6a. The court of appeals construed Arizona law to provide that the State would be subject to liability for a failure by its mine inspectors to perform mandatory safety inspections. *Ibid.* By analogy, therefore, the court concluded that the federal government would be liable if it failed to perform mandatory duties under federal law. In the court of appeals' view, respondents had "allege[d] facts showing that Kirk and Varland breached mandatory duties under the Federal Mine Safety and Health Act, * * * the MSHA Handbook, and the Agency's Policy Manual." *Id.* at 7a. It therefore concluded that respondents had stated a claim for liability under the FTCA. *Ibid.*

b. The court of appeals also held that the discretionary function exception was inapplicable, determining that the government had failed to establish at the motion-to-dismiss stage that the actions at issue were discretionary. Pet. App. 2a-5a.[2]

SUMMARY OF ARGUMENT

The plain text of the Federal Tort Claims Act waives the United States' sovereign immunity only "under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance

[1] The district court entered judgment on respondents' complaint under Rule 54(b) because it did not enter final judgment with respect to several distinct claims brought in a separate case by the family of Jose Villanueva, a miner killed in the same accident. Pet. App. 32a-33a. The district court had consolidated respondents' case with the *Villanueva* case. *Id.* at 8a. The *Villanueva* claims are not at issue in this Court.

[2] Although the United States did not seek review of that fact-bound aspect of the court of appeals' decision in this Court, nothing in that opinion forecloses the United States from reasserting the discretionary function defense on remand after further factual development.

with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). Disregarding this clear statutory text, the court of appeals looked only to whether "*state and municipal entities* would be liable under like circumstances." Pet. App. 6a-7a (emphasis added). That approach cannot be reconciled with the plain text of the FTCA, the decisions of this Court, or the Congressional purpose behind the FTCA. And it fundamentally expands the FTCA's waiver of sovereign immunity beyond the bounds established by Congress.

A. "[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotation marks omitted). The text of the FTCA could not be more plain: it limits the United States' waiver of its sovereign immunity, as well as the scope of its substantive liability, to the liability of a "private person," 28 U.S.C. 1346(b)(1), under "like circumstances," 28 U.S.C. 2674. That text forecloses any resort to the principles of state or municipal liability and limits courts to consideration of liability rules for private parties, such as the Good Samaritan doctrine. Yet the court of appeals subjected the United States to liability standards applicable to state and municipal governmental entities, without regard to whether a private person would be liable. In so doing, the court ignored this Court's instruction that the United States' waiver of sovereign immunity in the FTCA should not be extended beyond that prescribed by Congress. *Smith* v. *United States*, 507 U.S. 197, 203 (1993).

Moreover, this Court long has interpreted the relevant text of the FTCA according to its clear terms, leaving no doubt that state-law liability imposed on

private persons, not on state governmental entities, determines the FTCA liability of the United States. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). The legislative history of the FTCA confirms Congress's purpose to incorporate state law applicable to private persons as the cornerstone of FTCA liability.

B. There simply is no justification for the court of appeals' stark departure from the text of the FTCA. The Ninth Circuit based its reliance on the liability of state and municipal entities on the purported "unique governmental functions" of federal mine inspectors. Pet. App. 6a. But this Court has rejected the view that the "uniquely governmental" nature of the conduct at issue can justify resort to the state tort law of governmental entities. See, *e.g.*, *Indian Towing*, 350 U.S. at 64-65. Rather, even when the government engages in "uniquely governmental" conduct, the proper inquiry under the FTCA is whether a "private person" would be liable under "like circumstances." *Ibid.*

The decision below transforms the FTCA from a statute waiving the sovereign immunity of the United States in situations in which a private individual would be liable to one that also waives the sovereign immunity of the United States on the same terms as States and municipalities, even when a private individual would not be liable. But in circumstances in which a private individual would not be liable, there is no liability under the FTCA. That does not necessarily mean that there is no liability for a federal employee's violation of a federal duty. A *Bivens* action may be available in the case of a constitutional tort,[3] and an

[3] See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

entire body of jurisprudence addresses the availability of private causes of action under federal law. But nothing suggests that Congress delegated questions about the extent of the federal government's sovereign immunity for violations of federal law to the disparate judgments of 50 States regarding the extent to which state and local governmental entities should enjoy sovereign immunity.

Moreover, by using Arizona law to make the federal government (and the federal government alone) liable for violations of mandatory federal duties, the Ninth Circuit further distorted the FTCA. The FTCA makes the government liable for conduct that is tortious if committed by a private person under *state* law, not federal law. *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994). In contravention of that statutory text, the court of appeals' reasoning would render every responsibility imposed on federal employees by federal law, regulation, or policy manual a potential source of tort liability. The court of appeals' approach also ignored the fact that mandatory obligations imposed on federal employees by a federal statute, regulation, or policy are the means of ensuring that the employees carry out the responsibilities they owe *to the United States*, to ensure that the government's mission will be fulfilled. They are not generally designed to create duties, actionable in tort, that are owed to particular private parties. In this case, for example, the ruling below would essentially render the Mine Safety and Health Administration directly responsible for the safety of individual miners, even though the Mine Act expressly states that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines." 30 U.S.C. 801(e).

There is nothing anomalous about applying the tort law applicable to private persons in a case such as this. Private entities routinely conduct safety inspections. In Arizona, tort claims against such entities are governed by the Good Samaritan doctrine, as defined in Sections 323 and 324A of the Restatement (Second) of Torts (1965), which describes the liability of one who undertakes to render services to another. Other courts of appeals have applied that very standard to FTCA claims alleging negligence by federal mine inspectors. That is the standard the court of appeals should have applied here and should apply on remand.

ARGUMENT

A. THE FEDERAL TORT CLAIMS ACT WAIVES THE UNITED STATES' SOVEREIGN IMMUNITY ONLY TO THE EXTENT THAT A PRIVATE PERSON IN LIKE CIRCUMSTANCES WOULD BE LIABLE

1. The FTCA waives the United States' sovereign immunity only "under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added). The plain text of that provision clearly limits the United States' tort liability to that of a private person under state law, and it confines the jurisdiction of the federal district courts to such claims. 28 U.S.C. 1346(b)(1).[4] Lest there be any doubt on the limit of the United States' waiver of its sovereign immunity, that limitation is reiterated in the provisions of the FTCA defining the scope of the United States'

[4] That waiver is itself subject to several exceptions. See 28 U.S.C. 2680(a)-(n); 28 U.S.C. 1346(b)(1).

liability. The FTCA provides that the United States shall be liable for tort claims only "in the same manner and to the same extent *as a private individual* under like circumstances." 28 U.S.C. 2674 (emphasis added). That provision not only confines the scope of the United States' substantive liability, it also constitutes a condition on the United States' waiver of its sovereign immunity. See 28 U.S.C. 1346(b)(1) (incorporating "the provisions of chapter 171," *i.e.*, 28 U.S.C. 2671 *et seq.*).

Disregarding the FTCA's plain text, the court of appeals looked not to the liability of private persons under Arizona law, but to "whether, under Arizona law, *state and municipal entities* would be liable under like circumstances." Pet. App. 6a. (emphasis added). That approach cannot be sustained. "[W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)); accord *Lamie* v. *United States Trustee*, 540 U.S. 526, 534 (2004); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). That well-established principle has particular force here, because the statutory provision at issue is a waiver of the United States' sovereign immunity. As this Court has made clear, the FTCA itself establishes the limits of that waiver, and those limits may not be extended beyond the bounds established by Congress. *Smith* v. *United States*, 507 U.S. 197, 203 (1993). The text of the FTCA simply leaves no room to expand the United States' liability in tort—as the court of appeals did here—to encompass additional liability that a State has chosen to impose upon its own governmental entities, without regard to whether a private person would be liable in like circumstances.

2. This Court's decisions construing the "private individual" language in the FTCA likewise foreclose the conclusion reached by the court below. This Court long has made clear that the liability of the United States under the FTCA must be judged by reference to the liability imposed upon private individuals and not by reference to the liability of a State or municipality.

The Court so held in its seminal decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). In that case, the Court considered an FTCA claim that the United States was liable for the Coast Guard's alleged negligence in the operation of a lighthouse. *Id.* at 62. The United States contended that it was not liable under the FTCA for the performance of such "uniquely governmental functions." *Id.* at 64. In effect, the Court observed, the United States sought to "read[] the statute as imposing liability in the same manner as if [the United States] were a municipal corporation and not as if it were a private person." *Id.* at 65.

The Court expressly rejected that approach. The Court reasoned that to accept it would saddle the FTCA with "the casuistries of municipal liability for torts." *Indian Towing*, 350 U.S. at 65. The Court declined to "push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations," noting the "irreconcilable conflict" among the various state laws of governmental liability. *Ibid.*

Instead, the Court held that, even when the United States performs "uniquely governmental functions," the question is not whether a municipality would be liable, but whether a private party would be liable. *Indian Towing*, 350 U.S. at 64-65. That is so, the Court explained, because the text of the FTCA requires reference to the liability principles applicable to a private

individual in "like," not "the same," circumstances. *Id.* at 64. And, of particular importance here, the Court suggested that the liability of the United States for the Coast Guard's alleged negligence in the operation of the lighthouse should be resolved under the Good Samaritan doctrine that is part of the law of torts applicable to private persons. *Id.* at 64-65.

The Court reaffirmed *Indian Towing*'s reading of the FTCA in *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). That case involved the alleged negligence of the Forest Service in allowing flammable material to accumulate on federal land and in failing to prevent, contain, and extinguish a fire that began on that land. *Id.* at 316-317. The Court rejected the United States' argument that it was not liable because of Washington state law limiting the liability of municipal or other local governments for the actions of public firefighters. *Id.* at 318-319. Instead, the Court held that the provisions of the FTCA, "given their plain natural meaning, make the United States liable to petitioners for the Forest Service's negligence in fighting the forest fire if, as alleged in the complaints, Washington law would impose liability on private persons or corporations under similar circumstances." *Id.* at 318.

The Court deemed it irrelevant in *Rayonier* that public firefighters were immune under state law because of their "uniquely governmental capacity," *Rayonier*, 352 U.S. at 318-319 (internal quotation marks omitted), observing that the Court had "expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body." *Id.* at 319. Rather, the Court held, "the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for

similar negligence under the laws of the State where the acts occurred." *Ibid.* See also *United States* v. *Muniz*, 374 U.S. 150, 164 (1963) (holding that federal prisoners may bring suit under the FTCA even though state jailers or the State itself might be immune from tort suits by prisoners); *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004) (FTCA was designed "to render the Government liable in tort as a private individual would be under like circumstances") (quoting *Richards* v. *United States*, 369 U.S. 1, 6 (1962)).

To be sure, in *Indian Towing* and *Rayonier*, subjecting the United States to the state law applicable to governmental entities would have rendered the United States immune from suit, rather than subjected it to special rules *imposing* liability, as in the present case. But the Court's refusal to apply the law applicable to local governmental entities was not based on an interest in maximizing the United States' liability: it was based on the text of the FTCA. See *Indian Towing*, 350 U.S. at 64-65; *Rayonier*, 352 U.S. at 318. Indeed, in *Indian Towing*, the Court noted that the incorporation of governmental liability principles was "unsatisfactory" regardless of whether the outcome under a particular State's law of governmental liability would be immunity for the United States or a judgment of liability against the United States. See 350 U.S. at 65 & n.1.

3. Given the plain language of the FTCA, resort to the legislative history is unnecessary. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 186-187 & n.8 (2004); *Ratzlaf* v. *United States*, 510 U.S. 135, 148 (1994) (observing that there is no need to resort to legislative history to cloud clear legislative text). But even if the Court were to turn to the legislative history, that history demonstrates a congressional purpose to expose

the United States to liability for the conduct of its employees only to the extent that a private individual would be liable under like circumstances.

The FTCA was the product of "nearly thirty years of congressional consideration." *Dalehite* v. *United States*, 346 U.S. 15, 24 (1953). As this Court recognized in *Dalehite*, Congress's purpose in enacting the FTCA was to relieve Congress and the President from the burden of disposing of the great number of private claim bills filed each year seeking redress for alleged tortious conduct by government employees. *Id.* at 24-25 & n.9; see S. Rep. No. 1400, 79th Cong., 2d Sess. 30-31 (1946) (describing "the magnitude of the task of considering and disposing of private claims"); *Indian Towing*, 350 U.S. at 68-69 (recognizing that "[t]he broad and just purpose" of the FTCA was "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws"); *Feres* v. *United States*, 340 U.S. 135, 139-140 (1950) ("As the Federal Government expanded its activities, its agents caused a multiplying number of remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the Government."). "Uppermost in the collective mind of Congress were the ordinary common-law torts"—such as "negligence in the operation of vehicles," an example frequently mentioned throughout the legislative history. *Dalehite*, 346 U.S. at 26 n.10, 28; see S. Rep. No. 1400, *supra*, at 31; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 3 (1946); see also *Sosa*, 124 S. Ct. at 2751 n.4 ("The FTCA was passed with precisely these kinds of garden-variety

torts in mind."); *id.* at 2780 n.5 (Ginsburg, J., concurring) ("Enacting the FTCA, Congress was concerned with quotidian 'wrongs which would have been actionable if inflicted by an individual or a corporation.'") (quoting *Feres*, 340 U.S. at 139).

Because Congress was concerned about the problems created by the commission of "ordinary common-law torts" by government employees of the sort that private persons commonly commit (*e.g.*, negligence in the operation of a vehicle), *Dalehite*, 346 U.S. at 28, it was natural that Congress would choose to waive the United States' sovereign immunity for tort liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see 28 U.S.C. 2674. The legislative history reveals no intent to extend the United States' liability beyond that provided by the text of the FTCA just quoted, or beyond that of a private person under state law, so as to encompass any *additional* liability that a State may choose to impose upon its own governmental entities. To the contrary, the legislative history confirms that Congress's purpose was to make the tort liability of the United States "the *same* as that of a private person under like circumstance, in accordance with the local law." S. Rep. No. 1400, *supra*, at 32 (emphasis added); accord *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 26 (1942). As explained by a Special Assistant to the Attorney General, testifying on an earlier bill materially identical in relevant part to the version ultimately enacted, the bill would not permit "every private claim against the government [to] go to court, but only that type of claim which would be

justiciable as against private individuals." *Tort Claims Against the United States: Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary*, 76th Cong., 3d Sess. 52-53 (1940) (statement of Alexander Holtzoff, Special Assistant to the Attorney General).

B. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE TEXT OF THE FTCA, THIS COURT'S DECISIONS, AND THE PURPOSE OF THE FTCA

Ignoring the "private person" limitation mandated by the text of the FTCA and this Court's decisions, the court of appeals, as noted above, looked to "whether, under Arizona law, state and municipal entities would be liable under like circumstances." Pet. App. 6a. It did so based on its conclusion that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" *Id.* at 5a-6a (brackets added by court of appeals; citations omitted). The court of appeals therefore believed that the liability of the United States should instead be determined by reference to an Arizona statute, Ariz. Rev. Stat. Ann. §§ 12-820 *et seq.* (West 2003), that declares it "to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state." *Id.* § 12-820 (historical and statutory note, citing 1984 Ariz. Sess. Laws ch. 285, § 1); Pet. App. 6a. Determining that Arizona could be liable under circumstances similar to those here for the actions of a state mine inspector, the court of appeals concluded that the federal government also could be held liable. Pet. App. 6a-7a.

1. As discussed above, the court of appeals' analysis is entirely at odds with the text of the FTCA. It also cannot be squared with this Court's decisions interpreting that text or with the purposes of the FTCA. And the Ninth Circuit's approach would subject the United States to the "inevitable chaos" of state and municipal liability. See *Indian Towing*, 350 U.S. at 65.[5]

The effect of the Ninth Circuit's approach, moreover, is to adopt a rule that serves to maximize the liability of the United States by subjecting it to liability in tort under *either* the principles governing liability of private individuals *or*, if those principles do not result in liability, to the principles applicable to governmental entities. It is wholly inconsistent with well-established canons of construction to expand a waiver of sovereign immunity beyond the explicit limit in the statutory text to effectuate such a rule of maximum liability. See *Ron Pair Enters.*, 489 U.S. at 241; *Smith*, 507 U.S. at 203.

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[5] The changing nature of Arizona law defining the scope of governmental liability exemplifies the "inevitable chaos" to which the Court referred. Compare *Stone* v. *Arizona Highway Comm'n*, 381 P.2d 107, 109-112 (Ariz. 1963) (en banc) (abolishing "the rule of governmental immunity from tort liability" and announcing that "where negligence is the proximate cause of injury, the rule is liability and immunity is the exception"), with *Massengill* v. *Yuma County*, 456 P.2d 376, 381 (Ariz. 1969) (en banc) (adopting public-duty doctrine, *i.e.*, holding that the duties of public officers are owed to the general public rather than to any particular member of the public), and *Ryan* v. *State*, 656 P.2d 597, 599-600 (Ariz. 1982) (en banc) (overruling *Massengill* and renouncing the public-duty doctrine, while "hasten[ing] to point out that certain areas of immunity must remain" and endorsing use of governmental immunity as a defense when necessary "to avoid a severe hampering of a governmental function or thwarting of established public policy"), and *Clouse* v. *State*, 16 P.3d 757, 760 (Ariz. 2001) (en banc) (discussing legislation passed in response to *Ryan*).

2. In any event, this Court has expressly rejected the justification the court of appeals advanced for looking to the law applicable to governmental entities—that because regulatory inspections involve "uniquely governmental" conduct, there is no need to apply the law as it relates to private individuals. See, *e.g.*, *Indian Towing*, 350 U.S. at 64-65. As the Court has made clear, even in situations involving uniquely governmental conduct, the proper inquiry is to look to whether a private individual would be liable under "like circumstances." *Id.* at 64 (quoting 28 U.S.C. 2674).

In relying upon the purported "unique governmental functions" of the mine inspectors here, the court below followed (Pet. App. 5a-6a) a line of Ninth Circuit decisions holding that the court may look to state tort law applicable to governmental entities when the United States is performing "activities that private persons do not perform." *Hines* v. *United States*, 60 F.3d 1442, 1448 (9th Cir. 1995) (holding that "[b]ecause private persons do not wield power to screen drivers of independent contractors who deliver bulk mail, the proper examination is whether state or municipal entities would be subject to liability").[6] That line of cases derives from the Ninth Circuit's decision in *Louie* v. *United States*, 776 F.2d 819, 824-825 (1985).

In *Louie*, the plaintiff's husband was killed when a car driven by an intoxicated off-duty federal soldier collided with his car on a public highway. 776 F.2d at 821. Several hours before the fatal accident, the local sheriff's office had arrested the soldier for driving

[6] See, *e.g.*, *Concrete Tie of San Diego, Inc.* v. *Liberty Constr., Inc.*, 107 F.3d 1368, 1371 (9th Cir. 1997); *Aguilar* v. *United States*, 920 F.2d 1475, 1477 (9th Cir. 1990); *Doggett* v. *United States*, 875 F.2d 684, 689-693 (9th Cir. 1989).

while under the influence and returned him to his military base, where federal military police officers had transported him from the main gate to his quarters. *Ibid.* The plaintiff alleged that the United States was liable under the FTCA for failing to control the actions of the off-duty soldier in the several hours prior to the accident. *Id.* at 821-822. The Ninth Circuit held that, under the circumstances, the military police officers owed no duty to the accident victim under Washington law. *Id.* at 827.

It is noteworthy that *Louie* itself did not disregard the private person analogy. Although the *Louie* court determined that no liability should be imposed on the United States for the actions of the military police officers because state law would not have imposed liability on governmental entities, the court emphasized that that approach was appropriate only because under Washington law, state and municipal governmental entities are liable only to the same extent as a private person. *Louie*, 776 F.2d at 825. The Court stressed that "[t]his equivalence is important because * * * a finding of immunity for state employees under state law does not determine the scope of the United States' liability under the FTCA." *Ibid.*

More fundamentally, to the extent that *Louie* and its progeny hold or suggest that the FTCA liability of the United States can be judged according to the liability of state governmental entities without regard to whether a private individual under like circumstances would be liable, those decisions are as misconceived as the decision below. If a private individual in like circumstances would not be liable, or if there is no private individual in like circumstances, the United States is simply not liable under the FTCA. See, *e.g.*, *Feres*, 340 U.S. at 141, 146 (holding that the United States is not

liable under the FTCA to those serving in the military for injuries arising out of or incident to their service) ("One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States.").[7]

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[7] Other FTCA cases have, like *Louie*, involved allegations that Park Rangers, DEA Agents, and similar federal law enforcement officers have been negligent in carrying out certain of their functions (*e.g.*, stopping vehicles on the highway) for which there often may not be a "private person" analog. Some courts of appeals—while recognizing that the relevant state law in such cases is that pertaining to private individuals and declining to apply state laws rendering a state or local government *immune* from suit—have nevertheless looked to whether a state law enforcement officer in similar circumstances would owe an actionable special duty to a particular member of the public to prevent injury, rather than a general duty to the public at large to enforce the law. See, *e.g.*, *Crider* v. *United States*, 885 F.2d 294, 296-298 (5th Cir. 1989), cert. denied, 495 U.S. 956 (1990); *Louie*, 776 F.2d at 825; cf. *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F.3d 498, 502-505 (4th Cir. 1996); see also *Kaniff* v. *United States*, 351 F.3d 780, 790 (7th Cir. 2003) (leaving the question open). But even in the specific law enforcement context of cases like *Louie*, where an appropriate analog may be less readily available (if available at all), the guidepost must be the state tort law pertaining to private persons, if any, in like circumstances. See, *e.g.*, *Bolduc* v. *United States*, 402 F.3d 50, 59 (1st Cir. 2005) (rejecting FTCA liability for FBI agent's failure to disclose exculpatory evidence because "Wisconsin law nonetheless would preclude the imposition of private liability on a private person in circumstances similar to those" presented).

That said, cases involving law enforcement officers like FBI or DEA Agents or Park Rangers may sometimes raise distinct issues that are not presented here, such as the privileges or prerogatives that such officers necessarily have to arrest suspects where in other circumstances such conduct would constitute assault or battery. See, *e.g.*, *Washington* v. *DEA*, 183 F.3d 868, 874 (8th Cir. 1999). Often such special privileges or prerogatives are part of

3. The Ninth Circuit's decision, which would make federal liability for uniquely governmental functions without a private-liability analog turn on state and municipal liability doctrines, reflects a fundamentally different policy judgment from that reflected in the FTCA. The FTCA waived the sovereign immunity of the United States in situations in which a private individual would be liable. In circumstances in which a private person would not be liable or that involve a uniquely governmental function with no private-liability analog (unlike this case, see pp. 31-33, *infra*), the FTCA does not impose liability. That is because, as the First Circuit recently explained, "the federal government does not yield its immunity with respect to obligations that are peculiar to governments or official-capacity state actors and which have no private counterpart in state law." *Bolduc* v. *United States*, 402 F.3d 50, 57 (1st Cir. 2005).[8] That is not to say that there is no source of potential federal liability in such situations. In cases involving constitutional torts, an injured party may have a *Bivens* action. Moreover, in

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broader principles of state law that encompass actions by private individuals as well. See, *e.g.*, Restatement §§ 10, 63, 65, 76, 114, 119, 120A, 121, 196, 197. And federal law itself also confers certain privileges, or immunity from regulation under state law, on federal officers in certain circumstances. See *In re Neagle*, 135 U.S. 1, 61-63, 68-70, 76 (1890) (holding federal Marshal not liable under California law for killing a man who attacked a United States Supreme Court Justice, as the Marshal was "acting under the authority of the law of the United States, and was justified in so doing"). The Court need not consider such issues here, however.

[8] See also *DiMella* v. *Gray Lines of Boston, Inc.*, 836 F.2d 718, 720 (1st Cir. 1988) ("Whatever liability the Commonwealth may have chosen to assume for itself as a matter of governmental policy has no bearing on the liability of Massachusetts private persons, the standard the federal government accepted [in the FTCA].").

the case of statutory or regulatory violations, an express cause of action may be available, and an entire body of jurisprudence exists to identify implicit causes of action. But there is no indication in the FTCA, or in any other source of law, that in those situations in which a private party would not be liable, Congress incorporated the disparate judgments of 50 States about the extent to which sovereign immunity should be waived. That would be a radically different policy judgment than that actually enacted in the FTCA—liability to the extent of a private individual—and it is one this Court has expressly rejected.

To the extent the Ninth Circuit used Arizona law to make federal laws and regulations directly actionable, it further distorted the FTCA. The Ninth Circuit reasoned that, because "a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections," Pet. App. 6a, the United States could be held liable if federal mine inspectors "breached mandatory duties under the Federal Mine Safety and Health Act, 30 U.S.C. 801 *et seq.*, the MSHA Handbook, and the Agency's Policy Manual." Pet. App. 7a. In so holding, the Ninth Circuit premised the United States' potential FTCA liability not on the violation of duties based in state law, but on the purported violation of federal statutes, regulations, and policies.[9]

[9] The Ninth Circuit's reasoning here, which appears to make all mandatory federal statutory and regulatory duties actionable in the FTCA context (without regard to whether they would give rise to a federal cause of action under the normal federal-law principles for identifying causes of action) just because Arizona law appears to make all mandatory state-law duties of governmental entities actionable, is quite different from a decision applying state tort law that in turn expressly incorporates a federal-law standard of care, see, *e.g.*, *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804 (1986). The Arizona law on which the Ninth Circuit relied does not purport to make federal standards the measure of liability for any alleged tortfeasor—whether a private person or a state or federal official. Rather, the Ninth Circuit has made federal law actionable only with respect to the actions of federal officials.

That reasoning has the effect of making federal law an independent source of tort liability for the United States (and only the United States), contrary to the fundamental requirement that FTCA liability be based upon *state*-law tort principles applicable to private individuals. The FTCA waives the United States' sovereign immunity in tort, and grants federal courts jurisdiction over tort suits against the United States, only "under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*" 28 U.S.C. 1346(b)(1) (emphasis added); see *Molzof* v. *United States*, 502 U.S. 301, 305 (1992) (noting that "the extent of the United States' liability under the FTCA is generally determined by reference to state law"); *Richards* v. *United States*, 369 U.S. 1, 9 (1962) ("In the Tort Claims Act Congress has expressly stated that the Government's liability is to be determined by the application of a particular law, the law of the place where the act or omission occurred."); S. Rep. No. 1400, *supra*, at 32 ("The liability of the United States will be the same as that of a private person under like circumstance, in accordance with the local law.").

In *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994), this Court explained that "§ 1346(b)'s reference to the 'law of the place' means law of the State—the source of substantive liability under the FTCA." The Court therefore held that federal constitutional torts are not

actionable under the FTCA because, "[b]y definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right." *Ibid.* The Ninth Circuit's approach here is similarly impermissible. It effectively imposes FTCA liability for breach of mandatory responsibilities allegedly imposed on federal employees by federal law—*i.e.*, alleged "mandatory duties under the Federal Mine Safety and Health Act, * * *, the MSHA Handbook, and the Agency's Policy Manual," Pet. App. 7a –regardless of whether there is a breach of any actionable tort duty imposed on private persons by state law. And it imposes such liability only on the United States. That federal law would not be directly relevant in a tort action against a state official or a private individual.

That result is contrary to the well-established principle that "the FTCA was not intended to redress breaches of federal statutory duties." *Johnson* v. *Sawyer*, 47 F.3d 716, 727-729 (5th Cir. 1995) (en banc) (quoting *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983), cert. denied, 468 U.S. 1204 (1984)). Indeed, "[i]t is virtually axiomatic that the FTCA does not apply 'where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs.'" *Sea Air Shuttle Corp.* v. *United States*, 112 F.3d 532, 536 (1st Cir. 1997) (quoting *Johnson*, 47 F.3d at 728). That is so because "[t]he FTCA's law of the place requirement is not satisfied by * * * federal statutes or regulations standing alone * * *. The alleged violations also must constitute violations of duties analogous to those imposed under local law." *Chen* v. *United States*, 854 F.2d 622, 626 (2d Cir. 1988) (citations and internal quotation marks omitted).[10]

As the en banc Fifth Circuit has explained, "the violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a *nonfederal* context." *Johnson*, 47 F.3d at 728. Accordingly, as the Tenth Circuit has held with respect to federal mine inspectors, "[e]ven if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons." *Ayala* v. *United States*, 49 F.3d 607, 620 (10th Cir. 1995); cf. *Pate* v. *Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004) ("[E]ven where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on the [FTCA] if state law recognizes no comparable private liability.") (quoting *Sellfors*, 697 F.2d at 1367). Such a rule makes sense because, as discussed further at pp. 30-31, *infra*, the mere placement of a responsibility on federal employees by federal law, regulation, or policy as an internal matter, to ensure the consistent and effective operation of the government, does not impose upon the United States or its employees a duty, actionable in tort, owed to any particular member of the public. Cf. *Zabala*

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[10] See also, *e.g.*, *Bolduc*, 402 F.3d at 56 ("Federal constitutional or statutory law cannot function as the source of FTCA liability."); *Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157-1160 (D.C. Cir. 1985); *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1977), cert. denied, 435 U.S. 1006 (1978).

Clemente v. *United States*, [illegible] F.2d 1140, 1144-1145 (1st Cir. 1977) ("This duty to comply with the directives of their superiors is owed by the employees to the government and is totally distinguishable from a duty owed by the government to the public on which liability could be based."), cert. denied, 435 U.S. 1006 (1978).

The Ninth Circuit's analysis would have the effect of transforming every federal law, regulation, and policy manual that is written in mandatory terms to direct federal employees in obligations owed to their *employer* into a potential source of tort liability, at least whenever state law makes state governmental entities liable for violations of similar state laws and regulations —without regard to whether a "private person[] would be liable to the claimant." 28 U.S.C. 1346(b)(1). That is not the scheme Congress enacted, and it would greatly expand the bounds of Congress's waiver of sovereign immunity.

4. Such an expansion of the United States' exposure to liability would impose an immense burden on federal agencies, particularly those such as MSHA that regularly conduct inspections. Federal agencies undertake inspection and other regulatory activities designed to enforce federal requirements and to encourage safety measures by private individuals and businesses, such as the mine operators covered by the Mine Act. In so doing, the federal government does not accept responsibility for the safety of any particular individual. See, *e.g.*, *Myers*, 17 F.3d at 899-901 (rejecting plaintiffs' contention that the Mine Act and MSHA regulations are "'safety statutes' enacted to protect a particular class (miners) from a particular kind of harm (unsafe mining conditions)," such that breach of the Act or regulations subjects the United States to liability for negligence per se); see also *Zabala Clemente*, 567 F.2d at 1144 ("It

is obvious that one of the purposes of the Federal Aviation Act was to promote air travel safety; but this fact hardly creates a legal duty to provide a particular class of passengers particular protective measures.").

To the contrary, here, as the Mine Act expressly states, primary responsibility for the safety of the mines remains with the mine operators and the miners. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"). Despite that express disclaimer in the Mine Act, the Ninth Circuit adopted an approach that would essentially render MSHA directly responsible for the safety of particular individual miners, without regard to whether a private person would owe a duty in similar circumstances under state law. Such a result cannot be squared with the FTCA or the Mine Act. See, *e.g.*, *Myers*, 17 F.3d at 901 (rejecting FTCA claim based on alleged negligence of federal mine inspectors in part because plaintiffs' argument "would provide a means of making the government liable as an insurer for every private party's violation of a federal regulatory scheme"); see also *Zabala Clemente*, 567 F.2d at 1151 ("We do not believe that the expanded role of the federal government in the safety area through such legislation as OSHA indicates an intent of Congress to make the United States a joint insurer of all activity subject to inspection under that statute or others.").

5. For the foregoing reasons, the Ninth Circuit had no warrant to adopt an analysis flatly at odds with the FTCA's plain text and this Court's decisions. The Circuit's error is particularly striking because this case presents no anomalies or special difficulties in applying the text of the FTCA or this Court's precedents.

Private entities—such as insurance companies, labor unions, consultants, employers, and landowners—routinely conduct safety inspections analogous to the mine inspections at issue here. See, *e.g.*, *Radcliffe* v. *Rainbow Constr. Co.*, 254 F.3d 772, 776-777 (9th Cir.) (discussing workplace inspections by union representatives), cert. denied, 534 U.S. 1020 (2001); *Camacho* v. *Du Sung Corp.*, 121 F.3d 1315, 1317 (9th Cir. 1997) (describing state-law duty of commercial landowners to inspect premises); *Canipe* v. *National Loss Control Serv. Corp.*, 736 F.2d 1055, 1057 (5th Cir. 1984) (discussing tort liability of corporation that provided "safety inspections and related accident-prevention services at the plant in which the plaintiff worked"), cert. denied, 469 U.S. 1191 (1985).

As the district court recognized, see Pet. App. 23a-24a, in Arizona, where respondents' accident occurred, tort claims against private parties who conduct safety inspections are analyzed under the Good Samaritan doctrine, as defined in Sections 323 and 324A of the Restatement. See *Easter* v. *Percy*, 810 P.2d 1053, 1056-1057 (Ariz. Ct. App. 1991) (claim against consulting engineers for negligent inspection and supervision of construction project); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (claim that private company negligently inspected and selected defective beverage rack). That is the standard suggested by this Court in *Indian Towing*, 350 U.S. at 64-65, and the standard that other courts of appeals have applied to determine the extent of the United States' waiver of its sovereign immunity for allegedly negligent federal inspections, including inspections by federal mine inspectors, and similar regulatory activities. See *Raymer* v. *United States*, 660 F.2d 1136, 1142-1144 (6th Cir. 1981), cert. denied, 456 U.S. 944 (1982) (applying Good Samaritan

doctrine to FTCA claim involving alleged negligence of federal mine inspectors); *Myers* v. *United States*, 17 F.3d 890, 900-905 (6th Cir. 1994) (same); *Ayala*, 49 F.3d at 612-614 (same); see also, *e.g.*, *Dorking Genetics* v. *United States*, 76 F.3d 1261, 1266-1269 (2d Cir. 1996) (evaluating FTCA claim based on allegedly negligent inspection by Department of Agriculture veterinarians under Good Samaritan doctrine and other private liability principles); *Howell* v. *United States*, 932 F.2d 915, 918 & n.3 (11th Cir. 1991) (recognizing that the Good Samaritan doctrine "has been used by all circuits considering FTCA liability in a regulatory-enforcement context"); *Zabala Clemente*, 567 F.2d at 1145-1148 (evaluating FTCA claim involving FAA aircraft surveillance under Good Samaritan doctrine).

Accordingly, the Ninth Circuit should have assessed the potential liability of the United States under Arizona's Good Samaritan doctrine, and the Court should remand for the Ninth Circuit to address that question of state law in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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APRIL 2005

Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

No. 04-759

In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH OLSON, MONICA OLSON, AND JAVIER VARGAS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT

This case arises out of an accident at the Mission Mine, an underground copper mine operated by ASARCO, Inc., several miles south of Tucson, Arizona. J.A. 30. On January 31, 2000, Respondents Joseph Olson and Javier Vargas were working with another miner, Jose Villanueva, packing explosives into holes drilled into the ceiling to blast loose ore-bearing rock. J.A. 22-23, 30. Because of ASARCO's failure to provide adequate support for the mine ceiling, a nine-ton slab of rock fell on Olson, Vargas, and Villanueva. Villanueva was crushed to death, and Olson and Vargas suffered severe, disabling, and permanent injuries. J.A. 23, 25-26, 30.

Beginning about a year before the accident, James Kirk, a field supervisor for the Mine Safety and Health Administration (MSHA) in Mesa, Arizona, received a series of six anonymous complaints alerting him that the Mission Mine employed inadequate measures to prevent rock falls. J.A. 49-50. Although MSHA policy required him to evaluate all such complaints, later investigations by MSHA and by the Labor Department's Office of Inspector General concluded that Kirk had effectively failed to evaluate the complaints because of his mistaken belief that only signed, written complaints required evaluation. J.A. 55-57.

On September 28, 1999, after Kirk had received the complaints, MSHA mine inspector Alan Varland visited the Mission Mine to conduct an inspection. J.A. 25. MSHA is required by statute to inspect each underground mine "in its entirety" at least four times a year. 30 U.S.C. § 813(a). But despite this requirement – and even though a miner told him during the inspection that ASARCO was

not taking sufficient steps to prevent rock falls – Varland did not inspect all of the mine. J.A. 25, 61. In particular, he did not inspect parts of the mine that management had barricaded. J.A. 61. The complaints received by Kirk stated that ASARCO would barricade the dangerous areas when MSHA inspectors showed up and then re-open them after the inspectors left. J.A. 61. The accident that killed Villanueva and injured respondents Olson and Vargas occurred in one of the areas that Varland did not inspect. J.A. 25, 56, 61. Joseph Vargas, Javier Olson and his wife Monica Olson brought this action against the United States in the United States District Court for the District of Arizona to recover for their injuries suffered as a result of the accident. J.A. 22-23. The complaint alleged that the United States was liable under the FTCA because the plaintiffs' injuries were the proximate result of the negligence of MSHA employees Kirk and Varland in carrying out their mandatory duties to evaluate mine safety complaints and to inspect underground mines. J.A. 26-27.

SUMMARY OF ARGUMENT

The United States is seeking to drastically limit the Federal Tort Claims Act's (FTCA or Act) waiver of sovereign immunity. It urges two restrictions on the FTCA's scope, which are not in the Act's text or consistent with the Act's purpose. The United States contends: (1) that sovereign immunity still protects the United States from liability when its employees conduct activities that private persons do not perform, Brief for the Petitioner at 23 ("[I]f there is no private individual in like circumstances, the United States is simply not liable under the FTCA."); and (2) that sovereign immunity still protects the United

States from liability when its employees violate federal standards and regulations, Brief for the Petitioner at 28 ("It is virtually axiomatic that the FTCA does not apply where the claimed negligence arises out of the failure of the United States to carry out a federal statutory duty in the conduct of its own affairs.") (brackets and internal quotations marks omitted).

But the FTCA was intended to broadly waive sovereign immunity. *Berkovitz v. United States*, 486 U.S. 531, 535 (1988). This waiver includes circumstances where the United States' employees conduct activities that private persons do not generally perform, *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955), and where the United States' employees violate the statutes and regulations that govern their conduct, *Moody v. United States*, 774 F.2d 150, 157 (6th Cir. 1985).

The FTCA does not fully explain what courts should do when the wrongful act committed by the federal employee is not one which a private person has the authority or occasion to commit. The best solution to fill that gap – and the one most consistent with the intent of the Act – is to look to a state actor under like circumstances. *See, e.g,. Louie v. United States*, 776 F.2d 819, 824-25 (9th Cir. 1985). If that state actor would be liable under the law of the state, then the United States would be liable under the FTCA so long as: (1) state governmental immunities are not imported into the analysis, and (2) the United States is not subject to any greater liability than that of a private person. Respondents agree with the United States that importing state immunities or subjecting the United States to greater liability than that of a private person is inconsistent with the intent of the Act.

In many states, including Arizona, government actors are treated like private persons for tort liability purposes. *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982). When that is the case, looking to a state actor to find the most analogous factual circumstance is consistent with, even required by, the FTCA. *See, e.g., Louie*, 776 F.2d at 824-25. Refusing to look to a state actor violates the "like circumstances" requirement and forces courts to compare apples to oranges – an analysis that frequently causes confusion and results inconsistent with Congress's intent to broadly waive sovereign immunity and to compensate the victims of federal actors' negligence.

Without a doubt, a state mine inspector would be subject to liability in Arizona for negligent inspection. *See De la Cruz v. State of Arizona*, 961 P.2d 1070 (Ariz. App. 1998); *Diaz v. Magma Copper Co.*, 950 P.2d 1165 (Ariz. App. 1997). That liability does not depend on a mine inspector's status as a state actor, but rather on liability principles that apply equally to private persons and state actors. The United States should therefore be subject to liability for the same conduct under the FTCA. Doing so would not subject the United States to liability greater than that of a private person.

The United States further contends it is immune from liability when its employees violate federal statutes and regulations. But private persons do not enjoy such immunity in Arizona. In Arizona, violations of even federal statutes and regulations subject a private person to liability under to the doctrine of negligence per se. *Martin v. Schroeder*, 105 P.3d 577, 582 (Ariz. App. 2005). The federal statutes and regulations provide a source of duty and standard of care under Arizona law. *Id.* Subjecting the United States to liability is not based on the federal

statutes and regulations "standing alone." Rather, the violations also constitute violations of duties analogous to those imposed under Arizona law. *Id.*

Finally, while the United States would be liable under the Good Samaritan doctrine in Arizona, it is not necessary, and even contrary to the "like circumstances" requirement of the FTCA, to resort to that doctrine. The Good Samaritan doctrine is a source of duty under Arizona law. *See Papastathis v. Beall*, 723 P.2d 97 (Ariz. App. 1986). But it is generally applied in those situations where the actor was not required to act, but did so anyway – a voluntary undertaking. Here, the federal mine inspectors did not voluntarily undertake to inspect the mine; they were required to do so by the federal statutes and regulations. Thus, when looking to state law for a private person "under like circumstances," that private person must be required to inspect. The question becomes would a private person who was required to inspect be liable under Arizona law for negligently inspecting? Comparing the mine inspectors' conduct to a voluntary undertaking is a legal fiction and not a "like circumstance."

ARGUMENT

The Federal Tort Claims Act (FTCA or Act) waives the United States' sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The United States will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The FTCA

has three generally recognized purposes: (1) to broadly waive the sovereign immunity of the United States; (2) to compensate the victims of federal actors' negligence; and (3) to relieve Congress of the legislative burden of enacting private laws for the relief of victims. *Berkovitz v. United States*, 486 U.S. 531, 535 (1988); *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955); *United States v. Yellow Cab Co.*, 340 U.S. 543, 550 (1951). The United States is asking this Court to significantly narrow the extent of its liability under the FTCA by offering two restrictions on the Act's reach. It contends that: (1) it is not liable when there is no identifiable private individual under like circumstances, and (2) it is not liable for violations of its statutes and regulations. Brief for the Petitioner at 22, 28. As demonstrated below, both interpretations are contrary to the FTCA's text and purpose, as well as the case law interpreting the Act.

I. When private persons do not regularly perform the type of conduct complained of, courts may look to an analogous state actor under like circumstances so long as the Court does not import state governmental immunities or make the United States liable to a greater extent than a private person.

The United States attempts to limit the FTCA's waiver of sovereign immunity by arguing that "if there is no private individual in like circumstances, the United States is simply not liable under the FTCA." Brief for the Petitioner at 23. It contends: "In circumstances . . . that involve a uniquely governmental function with no private-liability analog . . . the FTCA does not impose liability." Brief for the Petitioner at 25. The United States has been

arguing for years – unsuccessfully – that it is not liable for "uniquely governmental functions." *See Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955) (government argues that the FTCA "must be read as excluding liability in the performance of activities which private persons do not perform"); *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957) (government argues that the FTCA does not impose liability for negligence of its agents in uniquely governmental capacity). The United States' position finds no support in the FTCA's text or purpose and has been repeatedly rejected by this Court. Even where no private analogue exists, the United States will be liable for the wrongful conduct of its agents who commit torts that no private individual would possess the authority and opportunity to commit. *See, e.g., United States v. Muniz*, 374 U.S. 150 (1963); *Indian Towing*, 350 U.S. at 64-69.

The FTCA's text does not limit liability to the *activities* that private persons perform. The Act refers to a "private person" in relation to the *liability* of a private person, not the *activities* of a private person. In fact, the Act speaks of a government employee "acting within the scope of his office or employment," which presumably would, more often than not, involve governmental actors performing governmental duties. Section 1346 vests federal courts with exclusive jurisdiction for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, *would be liable* to the claimant in accordance with the law of the place where the act or omission occurred." (Emphasis added.) Similarly, section 2674 provides that the "United States *shall be*

liable . . . in the same manner and the same extent as a private individual under like circumstances." All conduct of the government is inescapably "uniquely governmental" in that it is performed by the government. *Indian Towing*, 350 U.S. at 67. Limiting the FTCA's liability to activities that private persons perform – such as "negligent driving" – is not supported by its language.

The United States attempts to support its assertion that no liability exists for activities private persons do not perform by looking to the legislative history of the Act. It quotes: "[u]ppermost in the collective mind of Congress were the ordinary common-law torts." Brief for the Petitioner at 18, *quoting Dalehite v. United States*, 346 U.S. 15, 26 n.10, 28 (1953). It suggests that Congress had "only garden-variety torts" in mind. Brief for the Petitioner at 18-19, *quoting Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2751 n.4 (2004). From that, the United States concludes that "it was natural that Congress would choose to waive the United States' sovereign immunity for tort liability only 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Brief for the Petitioner at 19, *quoting* 28 U.S.C. § 1346(b)(1).

But the United States' argument is a non sequitur. It does not follow from the United State's interpretation of the FTCA's legislative history that Congress intended to immunize the United States for those activities for which there is no direct private person analogue. First, the United States' conclusion that Congress was only concerned with "garden-variety torts" is open to question. The FTCA "extends to novel and unprecedented forms of liability as well." *Muniz*, 374 U.S. at 159, *citing Indian*

Towing Co. v. United States, 350 U.S. 61; *Rayonier, Inc. v. United States*, 352 U.S. 315.

Second, Congress created the FTCA, in part, because it thought "the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work." *Dalehite*, 346 U.S. at 24. Had Congress intended that the Government be liable only for "garden-variety torts" such as "negligence in the operation of vehicles," Brief for the Petitioner at 18, it could have easily excluded all regulatory activity from the FTCA's reach. It did not do so. Rather, the legislative history demonstrates that Congress intended to provide a remedy to those injured by the negligence of governmental employees "carrying out [the United States'] work." *Id.* at 24. The Act provides that the United States is liable for the negligence "of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346. "The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of *governmental activities* in circumstances like unto those in which a private person *would be liable*. . . . " *Indian Towing*, 350 U.S. at 68 (emphasis added).

The United States' argument is also contradicted by this Court's prior interpretations of the FTCA. In *Indian Towing*, this Court held that excluding liability for activities that private persons do not perform would "be attributing bizarre motives to Congress." 350 U.S. at 62. This Court refused to predicate "liability on such a completely fortuitous circumstance – the presence or absence of identical private activity." *Id.* at 67. No private person analogy was available in *Indian Towing* because private persons were not allowed to operate lighthouses. *Id.* at 67

n.2. This Court explained the bizarre result that would follow if liability were limited to those acts that private persons perform: "[I]f the United States were to permit the operation of private lighthouses ... the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity. ... " *Id.* at 66-67. "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id.* at 67. *See also Raymer v. United States.*, 660 F.2d 1136, 1140 (6th Cir. 1981) ("it is not determinative that private individuals do not engage in regulatory inspection and enforcement activities").

While the United States contends that the FTCA language is "plain," Brief for the Petitioner at 14, the Act does not fully explain what to do when the conduct complained of is conduct that private persons do not regularly perform. "A gap in the law exists if the tort complained of is performed by a federal agent carrying out a governmental function that no private individual could perform." *Aguilar v. United States*, 920 F.2d 1475, 1479 (9th Cir. 1990) (Noonan, J., dissent). Courts have typically filled this gap in one of two ways: imagine a private person and apply the Good Samaritan doctrine (which is not always the most "like circumstances") or look to a state actor under the law of the place. Respondents contend that the solution that best effectuates Congress's intent is looking to a state actor under the law of the place so long as doing so does not import state governmental immunities or make the United States liable to a greater extent than a private person. This solution is preferable because a state

actor in a factually analogous situation is in the most "like circumstances."

"Like circumstances" are those that "best articulate the state's negligence laws" under a case's particular facts. *Crider v. United States*, 885 F.2d 294, 296 (5th Cir. 1989). Here, the state mine inspector provides the most "like circumstances" available to judge whether the United States, if a private person, would be liable under the law of Arizona for the negligent conduct of an MSHA inspector. By looking to Arizona state entity law, the Ninth Circuit carried out in the most precise way possible Congress's intent to impose liability on the United States "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

The United States is concerned about the "inevitable chaos" that would ensue if courts look to an analogous state actor under like circumstances to determine its liability under the FTCA. It made a similar argument in *Muniz*, which this Court rejected. There, the government complained that it would be subject to too many varying state laws if the United States were held liable to prisoners for the negligence of its employees. *Muniz*, 374 U.S. at 161. This Court responded: "Without more definite indication of the risks of harm from diversity, we conclude that the prison system will not be disrupted by the application of Connecticut law in one case and Indiana law in another to decide whether the Government should be liable to a prisoner for the negligence of its employees." *Id.* at 162. Congress incorporated the substantive laws of the fifty states into the FTCA by requiring waiving immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. § 1346(b)(1). The United States' fear is unwarranted.

Courts should look to a state actor in like circumstances to determine whether the United States would be liable under the FTCA. Any other result would violate the "like circumstances" requirement because private persons simply do not perform regulatory inspections. If a state governmental entity would be liable, so, too, would the United States, as long as that liability is not based on a principle unique to governmental entities. In other words, if the principle of law which makes the governmental entity liable under like circumstances is equally applicable to a private person, the United States is exposed to liability under the FTCA.

A. Looking to a state actor is permissible under the FTCA so long as governmental immunities are not imported into the liability analysis.

The cases that prohibit looking to a state actor under like circumstances to determine liability under the FTCA do so to avoid importing a state's governmental immunities. *See, e.g., Indian Towing*, 350 U.S. at 65; *Rayonier*, 352 U.S. at 376 ("United States liability is not *restricted* to the liability of a municipal corporation or other public body and [] the injured party cannot be deprived of his rights under the Act by resort to an alleged distinction [] imported from the law of municipal corporations") (emphasis added); *Muniz*, 374 U.S. at 164-65. The FTCA "cuts the ground from" the doctrine of sovereign immunity. *Indian Towing*, 350 U.S. at 65. It would be "self-defeating" to allow the United States to use state immunities to revive

the governmental immunity the FTCA was designed to eliminate. *Id.*

Here, the United States is again attempting to make the FTCA self-defeating, this time by using the "private person" language to severely narrow its liability under the FTCA. It is attempting to give the words "private person" a meaning never intended by Congress. This Court has cautioned against "whittl[ing the FTCA] down by refinements" because such an approach is "inconsistent" with the Act's "breadth of purpose" and "general trend toward increasing the scope" of the United States' waiver of immunity. *United States v. Yellow Cab*, 340 U.S. 543, 549 (1951). "[I]t is fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy.'" *Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that courts must consider a state's conflict of laws provisions when determining the United States' FTCA liability under state law). The United States' narrow focus on the words "private person" creates an interpretation inconsistent with the FTCA's purpose and effectively immunizes the United States from liability in a host of circumstances not intended by Congress. The FTCA was intended to broadly waive sovereign immunity, not further immunize the United States.

The United States' interpretation is that if the tort committed is a type that a private person would not have the authority and opportunity to commit, then it is immune from liability. The government made the same argument in *Crider*, but the Fifth Circuit rejected it,

finding the Ninth Circuit's analysis more in line with the purposes of the FTCA.

> The government contends that the FTCA, in abrogating sovereign immunity where a "private individual" would be liable "under like circumstances," precludes us from considering whether Texas recognizes some duty on the part of law enforcement officers. By contrast in *Louie v. United States,* 776 F.2d 819, 825 (9th Cir.1985), a case closely analogous to this one, the government prevailed in its assertion that "reference to Washington law, setting forth the liability of state and municipal entities to establish the government's standard of liability under the FTCA, is both necessary and proper." *Id.* Under the special circumstances involved, we think the government got it right in *Louie.* We are not looking to state law insofar as it immunizes a public entity from liability; rather, we are seeking "like circumstances" which best articulate a state's negligence law.

Crider, 885 F.2d at 296.

The courts have struggled to reach consistent results when confronted with situations in which there is no analogous private activity. *Compare Crider*, 885 F.2d at 296-97 (standards applicable to state or local law enforcement officers apply, but immunities do not), *with Aguilar*, 920 F.2d at 1477 (statutes limiting state law enforcement officers' liability to $50,000 applied to United States). The United States attempts to explain the inconsistency this way: "Often such privileges or prerogatives are part of broader principles of state law that encompass actions by private individuals as well." Brief for the Petitioner at 24-25 n.7. In other words, the government tries to distinguish

those cases that have applied state entity law in law enforcement cases because, on a broader level, the state tort principles applicable to governmental entities are also applied to private persons. That point, now conceded by the government, is Respondents' whole argument. In some situations, it is appropriate to consider the liability of a state government actor when his job is more analogous to the job of the federal employee whose conduct gave rise to the FTCA claim, as long as the state actor's liability flows from principles that "encompass actions by private individuals as well," to use the government's phrase.

B. Looking to a state actor does not make the liability of the United States greater than that of a private person in Arizona because Arizona law equates the tort duties of public and private entities.

Perhaps part of the problem and the inherent confusion it engenders is in the terminology used. What exactly does "looking to state entity law" mean? Respondents are not arguing, and this Court does not have to hold, that the proper test is to apply a state's "governmental entity law." Respondents are arguing, however, that when the most analogous circumstances involve conduct generally performed by state actors, the proper analysis under the FTCA is to look to state law that applies to that state actor. "Like circumstances" are those "that best articulate the state's negligence laws" under a case's particular facts. *Crider*, 885 F.2d 294. An analysis of state law liability in such circumstances has nothing to do with "state entity law" because in Arizona, "a state actor is liable to the same extent as a private person." *Ryan v. State*, 656 P.2d 597, 599 (Ariz. 1982). If the principle of law which causes the

governmental entity to be liable under like circumstances is equally applicable to a private person, which it is in Arizona, the United States is exposed to liability under the FTCA.

The United States asserts that the FTCA does not encompass *additional* liability that a State may choose to impose on its own governmental entities. Brief for the Petitioner at 19. (Emphasis in original). We agree. The FTCA was intended to waive sovereign immunity and make the United States liable for the negligence of its employees just like private persons.

Although regulatory inspections are generally not performed by private persons, looking to a state actor for the most "like circumstances" will not subject the United States to any greater liability than that of a private person under Arizona law. Regulatory inspections are inherently governmental functions. It follows that the cases in Arizona discussing persons who negligently conducted inspections they were required to conduct would involve governmental entities. But looking to those cases to determine whether the United States would be liable for like conduct in Arizona does not expose the United States to any greater liability than that of a private person because in Arizona "the parameters of duty owed by the state will ordinarily be coextensive with those owed by others." *Ryan*, 656 P.2d at 599. Liability does not turn on the status of the actor.

In Arizona, the law applied to a state actor is the same as the law applied to a private individual, and a state actor is treated like a private litigant for tort purposes. *See Ryan*, 656 P.2d at 599-600. It has long been the law in

Arizona that "employers or principals, *individual, corporate or governmental*, are responsible for the tortious wrongdoing when committed by agents and employees acting within the scope of their employment." *Stone v. Arizona Highway Comm'n*, 381 P.2d 107 (Ariz. 1963) (emphasis added).

To the extent a state government entity and a private person are equally liable under state law in like circumstances, imposing liability on the United States necessarily comports with the FTCA's requirement that immunity be waived only when a private person would be liable under like circumstances. The Ninth Circuit's decision in this case is thus both permitted by and consistent with the FTCA's "private person" language. *See also Louie v. United States*, 776 F.2d 819, 825 (1985) (applying state entity liability because municipal entities are treated as private persons for tort liability purposes under Washington law).

C. The United States would be liable under Arizona law for its negligent inspection.

Arizona law imposes liability on entities for negligent inspection whether the actor is a public or private individual. In *Daggett v. County of Maricopa*, 770 P.2d 384 (Ariz. App. 1989), for example, the plaintiff was injured when he dove into a shallow pool at a water park. State and county regulations required the county health department to review and approve construction plans for the pool. The county health department was required to inspect the pool to enforce those regulations. *Id.* at 385. The *Daggett* court found that Maricopa County owed a duty to a swimmer who was injured because of negligent inspection of the public pool: "[N]egligence by a governmental entity in

performing inspections required by statute or regulation will support a claim by a person injured as a result of the entity's negligence." *Id.*

While it is true that in *Daggett* the negligent individual was a government employee, nothing in the *Daggett* analysis suggests a different result if the negligent individual were a private employee. Liability was not imposed on the defendant because of its government status, but rather because the individual inspector failed to act reasonably in performing required inspections.

In *Diaz v. Magma Copper Co.*, 950 P.2d 1165 (Ariz. App. 1997), the Arizona Court of Appeals allowed a wrongful death claim to proceed against the state mine inspector for negligent inspection. The state mine inspector argued that it was not liable, *citing United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984), which held that the United States was immune from liability for regulatory inspections and enforcement under the discretionary function exception of the FTCA. *Diaz*, 950 P.2d at 1176. The Arizona court found that argument unpersuasive because "it conflicts with Arizona precedent rejecting governmental immunity when required inspections are alleged to have been negligently performed and a cause of personal injury." *Id.* Thus, in Arizona, one who negligently performs a required inspection is liable. That liability is the same whether the actor is a state actor or a private individual. *See also De la Cruz v. State of Arizona*, 961 P.2d 1070 (Ariz. App. 1998) (State of Arizona liable to plaintiff for negligent inspection).

Although it is true the defendants in these cases were governmental entities, liability did not rest on that fact. These Arizona cases exemplify the well-established

Arizona policy that abolished most governmental immunity and treats public and private actors alike for tort liability purpose. "'There is perhaps no doctrine more firmly established than the principle that liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception.'" *Ryan*, 656 P.2d at 598, *quoting Stone*, 381 P.2d 107.

Arizona imposes liability on individuals who are required to inspect and who do so negligently, regardless of their status as a private or public individual. When the most "like circumstances" involve a state actor, the FTCA permits examining the liability of that actor to determine whether the United States would be liable under the law of the place. The Ninth Circuit's decision to evaluate liability from the standpoint of the Arizona State Mine Inspector is the most precise way available to affect Congress' intent to consider liability of a private individual under "like circumstances."

II. The FTCA provides for liability when the United States negligently performs its statutory and regulatory duties.

The United States claims: "It is virtually axiomatic that the FTCA does not apply where the claimed negligence arises out of the failure of the United States to carry out a federal statutory duty in the conduct of its own affairs." Brief for the Petitioner at 28 (brackets and internal quotation marks omitted). The United States attempts to immunize itself from liability in the performance of its statutes and regulations. This attempt is contrary to the explicit text of the FTCA, as well as cases interpreting the Act. *See, e.g., Florida Auto Auction of Orlando, Inc. v.*

United States, 74 F.3d 498 (4th Cir. 1996) ("[T]he Government insisted that breach of any duty imposed by 19 C.F.R. § 192.2(b) could not give rise to a state-law claim of negligence. . . . The Government's argument (an argument from which it attempted to distance itself during oral arguments) is wholly without merit.").

While our focus has primarily been on the language in the second part of 28 U.S.C. § 1346, the first part is relevant here as well. Section 1346 vests federal courts with exclusive jurisdiction for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." Federal statutes and regulations often govern and set the standard of care for employees of the Government acting within the scope of their employment. *See, e.g., United States v. Muniz*, 374 U.S. 150, 164-65 (1963) (In a FTCA claim, the "duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042").

The United States complains that if it were held to the standard of care imposed by its statutes and regulations, liability would be imposed "only with respect to the actions of federal officials." Brief for the Petitioner at 27 n.9. But its argument misses the mark. The FTCA, by definition, imposes liability only with respect to the actions of federal officials. But this observation does not mean that a private person would not be liable under like circumstances. Requiring the United States to perform its mandatory directives with reasonable care is not imposing any more liability on it than would be imposed on private persons. On the other hand, allowing the United States to escape liability for failing to follow its mandatory directives is vesting the United States with an immunity not enjoyed

by private persons – the result the FTCA was enacted to avoid.

The United States complains of the "immense burden" that would be imposed on it were it held to the standard of care contained in its own statutes and regulations. Brief for the Petitioner at 30. But such a burden is illusive. Congress created numerous exceptions to FTCA liability designed to alleviate any unjustified burden liability would impose. If the government's conduct does not fall within one of those exceptions, Congress intended for the United States to be liable for its negligence, just like private persons.

A. The text of 28 U.S.C. § 1280(a) demonstrates that Congress intended the United States to be liable for negligence in the course of carrying out statutory and regulatory duties.

The FTCA excludes from liability "[a]ny claim based upon an act or omission of an employee of the Government, *exercising due care*, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a) (emphasis added). By excluding liability for government employees *exercising due care* in executing statutes or regulations, the Act necessarily includes liability for government employees *not* exercising due care in executing those statutes or regulations. Congress could have easily excluded liability for all violations of federal statutes or regulations, but it did not. Interpreting the FTCA to immunize the United States from all liability while performing acts required by statutes or regulations would impose a result clearly unintended by Congress.

Courts have countless times found the United States liable for the negligence of its employees falling below the standard of care imposed by federal statutes or regulations. Harm caused by the United State's failure to exercise due care when acting pursuant to statutes and regulations is compensable under the FTCA. *See, e.g., United States v. Muniz,* 374 U.S. 150, 164 (1963) ("the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042"); *Hatahley v. United States*, 351 U.S. 173, 178-82 (1956) (United States can be liable under FTCA for its failure to follow procedures established in federal regulations requiring written notice before removing livestock); *Hines v. United States*, 60 F.3d 1442, 1448 (9th Cir. 1995) ("Under California law, a public entity can be held liable for injury when it fails to discharge a 'mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury,' and the entity's failure proximately causes that injury."); *Dupree v. United States*, 247 F.2d 819, 824 (3d Cir. 1957) ("When the government employees act pursuant to and in furtherance of regulations, resulting harm is not compensable under the act, *except where they do not exercise due care.*") (Emphasis added; internal citations omitted); *Donohue v. United States*, 437 F.Supp. 836 (E.D. Mich. 1977) (plaintiff stated valid cause of action under the FTCA against the United States for its failure to follow its own procedural regulations in suspending plaintiff's insurance license).

B. This Court's discretionary function exception jurisprudence demonstrates that the United States may be liable under the FTCA for violation of federal statutes and regulations.

The weakness of the United States' argument becomes crystal clear when one considers the discretionary function exception to the FTCA waiver of sovereign immunity. The United States enjoys immunity to FTCA liability when it exercises a discretionary function. The FTCA does not waive sovereign immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function." 28 U.S.C. § 2680(a). It is well-settled that no discretion is involved when a federal statute or regulation prescribes a course of action because the employee has no option but to follow the directive. *United States v. Gaubert*, 499 U.S. 315, 323 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988); *Phillips v. United States*, 956 F.2d 1071, 1077 (11th Cir. 1992) (discretionary exception did not apply because United States failed to use ordinary care in carrying out mandatory safety obligations).

In other words, it has long been the law that the United States is *immune* from liability when it performs discretionary functions, but is *exposed* to liability when it performs pursuant to a federal statute or regulation that mandates a course of action. *Gaubert*, 499 U.S. at 323, *Berkovitz*, 486 U.S. at 536, *Phillips*, 956 F.2d at 1077. Now, the United States is arguing that it also cannot be liable for its violations of these mandatory statutes and regulations. Congress did not intend such a result.

C. The United States is liable under the FTCA pursuant to Arizona's negligence per se doctrine.

1. The FTCA permits negligence per se liability for violations of federal laws if state laws would impose such liability in like circumstances.

For the purposes of the FTCA, the failure to follow federal regulations may be negligence per se if, under state law, the regulation is the type of regulation whose violation would constitute negligence per se. *See Sabin Oral Polio Vaccine Products Liability Litigation v. United States*, 984 F.2d 124, 127-28 (4th Cir. 1993) (United States can be liable under the FTCA for violation of federal regulation regarding issuing a license for live polio vaccine because under Florida law, violations of regulations constitute negligence per se, and under Maryland law, violations of regulations are unreasonable and a breach of the duty of care); *Cecile Indus., Inc. v. United States*, 793 F.2d 97, 99 (3d Cir. 1986); *Moody v. United States*, 774 F.2d 150, 157 (6th Cir. 1985) (United States can be liable under the FTCA for violation of federal regulation because under Tennessee law, a private individual can be liable for violation of a federal regulation); *Gill v. United States*, 429 F.2d 1072, 1075 (5th Cir. 1970) (while principles of state law control, federal regulations may impose duties and standards of conduct upon the actors).

It is true that some courts have refused to apply the doctrine of negligence per se in FTCA claims. *See, e.g., Delta Savings v. United States*, 265 F.3d 1017 (9th Cir. 2001). But the critical distinction between those cases that have refused the claims and those that have allowed the claims is whether, under state law, a private individual would be

liable in like circumstances. In *Delta Savings*, for example, the court noted that "plaintiffs have not cited any California cases which suggest that negligence per se actions can be premised on alleged violations of any of the federal civil rights statutes." *Id.* at 1026. The *Delta Savings* court acknowledged that "FTCA violations can be premised on state negligence per se causes of action," but reiterated that "plaintiffs in this case have not shown that the United States was bound by a duty under California law to support such a theory." *Id.*

In Arizona, negligence per se actions can be premised on violations of federal law. In *Martin v. Schroeder*, 105 P.3d 577 (Ariz. App. 2005), the Arizona Court of Appeals recently held that a violation of the Federal Gun Control Act's prohibition against transferring a firearm to a drug addict constitutes negligence per se, even though the federal statute at issue was silent on the issue of civil liability. *Id.* at 582. In fact, Arizona permits federal law to provide both a source of duty and a standard of care. *Id.* (Federal Gun Control Act supports imposing a duty and standard of care). For FTCA purposes, it is appropriate to look to federal law as a source of a duty and standard of care if the state would look to federal law to determine the existence of a duty and standard of care. *See, e.g., Rhoden v. United States*, 55 F.3d 428, 431 (9th Cir. 1995) ("In an action under the FTCA, a court must apply the law state courts would apply in the analogous tort action, including federal law."). Because a private individual can be liable under the doctrine of negligence per se for violating a federal statute or regulation under Arizona law, the United States may be liable under the FTCA for its violations of federal statutes and regulations.

2. The Mine Safety and Health Act is the type of statute to which Arizona's negligence per se doctrine applies.

In Arizona, a person who violates a statute or regulation enacted for the safety and protection of the public or the injured person is negligent per se. *Good v. City of Glendale*, 722 P.2d 386, 389 (Ariz. App. 1986). "The court may derive a standard of care from a statute 'if it first determines that the statute's purpose is in part to protect a class of persons that includes the plaintiff and the specific interest at issue from the type of harm that occurred and against the particular action that caused the harm,'" *Martin*, 105 P.3d at 582, *citing Tellez v. Saban*, 933 P.2d 1233, 1237 (Ariz. App. 1996); *see also Estate of Hernandez v. Ariz. Bd. of Regents*, 866 P.2d 1330, 1339 (Ariz. 1994). Arizona has adopted the Restatement (Second) of Torts § 286 to define when a statute or regulation will be adopted as the standard of care. *See Lombardo v. Albu*, 14 P.3d 288, 291-92 (Ariz. 2000). Section 286 provides:

> **When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted**
>
> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and

> (d) to protect that interest against the particular hazard from which the harm results.

The Mine Safety and Health Act (Mine Act) and its implementing regulations are laws of the type that would give rise to a negligence per se claim under Arizona law. Congress enacted the Mine Act, at least in part, to protect miners.[1] The United States concedes this point: "The Federal Mine Safety and Health Act of 1977 . . . 30 U.S.C. 801 *et seq.*, established a comprehensive scheme designed to promote the health and safety of the Nation's miners and improve working conditions in the Nation's mines." (Brief for the Petitioner at 2).

Because the Mine Act's purpose (even if only "in part"), was to "protect a class of persons [miners] which includes the one whose interest is invaded [Respondents Olson and Vargas]," it can set the standard of care in a negligence claim against the inspectors. The other requirements are also easily met. The Mine Act was designed to protect the particular interest which is invaded (mine safety); to protect that interest against the kind of harm which has resulted (injured miners); and to protect that interest against the particular hazard from which the harm results (unsafe conditions in the mine).

The Mine Act directs the Secretary of Health and Human Services and the Secretary of Labor to promulgate mandatory standards to protect the health and safety of miners. 30 U.S.C. § 801(g). It directs that MSHA "shall

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[1] While the United States contends that the Mine Act places "primary responsibility" for compliance with safety regulations on the mine operators, Brief for the Petitioner at 2, the Restatement only requires that the purpose of the legislative enactment be "in part" for the safety of the miners.

make inspections of each . . . mine in its entirety at least four times a year." 30 U.S.C. § 813(a).

If a miner has reasonable grounds to believe that a violation of the safety standards has occurred or an imminent danger exists, he has a right to an immediate inspection if he provides a written and signed notice to an inspector. 30 U.S.C. § 813(g)(1). Upon receipt of the notice, the inspector is required to conduct a special inspection as soon as possible. *Id*.

Because some complaints might not meet the technical requirements of 30 U.S.C. § 813(g)(1), the MSHA General Inspection Procedures Handbook in use at the time of the events at issue here required that "all complaints . . . must be evaluated." MSHA General Inspection Handbook at 27 (emphasis added). In addition, the MSHA Program Policy Manual required that the inspector "must evaluate and determine a course of action." MSHA Program Policy Manual, Vol. III at 42-1 (emphasis added). The Mine Act and its implementing regulations and policies are plainly intended to protect miners, including Respondents. Arizona courts would thus recognize a duty and standard of care based on the Mine Act pursuant to Arizona's negligence per se doctrine. *Martin*, 105 P.3d at 582.

III. The hypothetical "private person" must be an individual with a duty to inspect and not be on a mere frolic.

The confusion stemming from the "private person under like circumstances" analysis is compounded when courts look to a "private person," but ignore the "under like circumstances" requirement. The hypothetical private person used to determine liability under state law must be

a private person with a duty to inspect, whether contractual or otherwise, to satisfy the "like circumstances" requirement. The FTCA provides that the United States will be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. "Under like circumstances" should mean an inspector that was required to inspect with due care. Any analogy to a private person without a duty to inspect with due care falls short, and courts that rely on such an analogy are comparing apples to oranges.

The United States correctly points out that private people do perform inspections – "insurance companies, labor unions, consultants, employers, and landowners." Brief for the Petitioner at 32. But whether the private person in those examples is subject to liability is generally not dependent on the Good Samaritan doctrine. In those examples, as here, the inspector has a duty to inspect, whether imposed by statute, contract, or common law. There is thus no need to find an *additional* duty in the Good Samaritan doctrine. Similarly, under our facts, the United States had a duty to inspect the mine. The "like circumstances" analysis should properly be to an individual with a duty to inspect with reasonable care. Would a private person with a duty to inspect be liable for negligently performing that inspection under Arizona law? The answer is yes. The United States is therefore liable under the FTCA for the same conduct.

A. In Arizona, duty is broadly construed.

The United States' arguments appear to be an attempt to avoid a duty between the MSHA inspectors and the injured miners. Even if we ignore the statutes and

regulations that govern the United State's conduct, Arizona would still impose a duty on the inspectors. Once a party assumes a duty, even if not imposed by common law, the party must discharge that duty with reasonable care. *See Knauss v. DND Neffson Co.*, 963 P.2d 271, 277 (Ariz. App. 1997); *Martinez v. State*, 866 P.2d 1356 (Ariz. App. 1993). In Arizona, "courts will find a duty, where, in general, reasonable men would recognize it and agree that it exists." *Sanchez v. City of Tucson*, 953 P.2d 168, 173 (Ariz. 1998) *quoting Ontiveros v. Borak*, 667 P.2d 200, 208 (Ariz. 1983) (*citing* William L. Prosser, *Handbook of the Law of Torts*, § 53, at 324-27 (4th ed. 1971)).

Duty is a concept that arises out of the recognition that a relationship between persons may impose upon one a legal obligation for the benefit of the other. *Ontiveros*, 667 P.2d at 208 (finding a duty between tavern owner and innocent third party who was injured when intoxicated patron caused car accident). "[I]t should be recognized that 'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection." *Id. quoting* Prosser, § 42, at 324-27; *see also Daggett v. County of Maricopa*, 770 P.2d 384 (Ariz. App. 1989) (finding it unnecessary to look to Restatement §§ 323 and 324A for duty because a duty would be found in county regulations requiring county employees to inspect). Arizona no longer recognizes a public/private duty distinction, so state and county regulations can be source of duty regardless of whether a negligent actor is a private individual or state entity. *Id.*

B. The Good Samaritan doctrine should not be mechanically applied to all negligent inspection cases.

The Good Samaritan doctrine should not be automatically applied in all negligent inspection cases under the FTCA because it does not provide the most "like circumstances." While it is true that in Arizona, as in many other states, the Good Samaritan doctrine *can* provide a source of duty and liability for FTCA purposes, in many cases there is a better analogy. Here, for example, the most analogous person is a state mine inspector. As explained above, looking to Arizona law as it applies to a state mine inspector would not import immunities into the FTCA analysis, nor make the United States liable where a private person would not be liable. It simply provides the most "like circumstances" available to determine liability under Arizona law.

Nevertheless, if this Court decides to look to the Good Samaritan doctrine, the United States would be liable under this doctrine as incorporated in Arizona law. Arizona has adopted the Restatement (Second) of Torts § 324A. *See, e.g., Papastathis v. Beall*, 723 P.2d 97 (Ariz. App. 1986); *Cox v. May Dept. Store Co.*, 903 P.2d 1119 (Ariz. App. 1995). It provides:

> **Liability to Third Person for Negligent Performance of Undertaking**
>
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The requirements of the doctrine are stated in the disjunctive, so only one of the requirements needs to be met. Respondents Olson and Vargas relied on MSHA both to effectively monitor the safety conditions of the mine and to require ASARCO to comply with the safety provisions.[2] J.A. 98-99. In sworn statements, both miners testified:

> I went to work each day with the understanding that the MSHA inspectors were supposed to inspect the Asarco Mine with the goal of making the mine a safe place for me and other miners to work. I relied on that fact, as well as the assumption that the inspectors had expertise and would use it to exercise reasonable safety practices.

J.A. 98-99. The illustration in the comments to the Restatement makes the liability of the United States even clearer.

> A Company employs B Company to inspect the elevator in its office building. B Company sends a workman, who makes a negligent inspection and reports that the elevator is in good condition. Due to defects in the elevator, which a proper inspection would have disclosed, the elevator falls

[2] The District Court unexplainably made no reference to the reliance prong of the Restatement. Pet. App. 24a.

> and injures C, a workman employed by A Company. B Company is subject to liability to C.

Restatement (Second) of Torts § 324A, cmt. e, illus. 4. Consequently, even under the Good Samaritan doctrine, the United States would be liable under Arizona law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Date: July 2005

Supreme Court, U.S.
FILED
AUG 22 2005
OFFICE OF THE CLERK

No. 04-759

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 04-759

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH OLSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Federal Tort Claims Act (FTCA) expressly limits the United States' waiver of its sovereign immunity, as well as the scope of its substantive liability, to "circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (emphasis added); see 28 U.S.C. 2674. Disregarding the plain statutory text, the court of appeals failed to consider the liability of private persons, but instead looked only to whether "*state and municipal entities* would be liable under like circumstances," Pet. App. 5a-7a (emphasis added). And the court held that the United States could be found liable solely on the basis of violations of federal statutory or regulatory provisions that direct the conduct of federal mine inspectors, and that have no application to private persons. As explained in the opening brief, that approach cannot be reconciled with the text of the

FTCA, the decisions of this Court, or the purposes of the FTCA. And it significantly expands the FTCA's waiver of sovereign immunity beyond the bounds established by Congress by effectively creating a private right of action directly under federal regulatory statutes in which Congress declined to create a private right of action.

Respondents expressly acknowledge that subjecting the United States to greater liability than that of a private person would be inconsistent with the FTCA. See Resp. Br. 3, 16. Yet that is precisely what the Ninth Circuit has done in this case. Although Arizona has subjected its own governmental entities to tort liability with respect to mandatory state inspection obligations, private persons are liable to third parties in Arizona for negligent inspections only if the requirements of the "Good Samaritan" doctrine are satisfied. Because the FTCA requires reference to the liability of a private person rather than a governmental entity, the United States may be held liable in this case only if the requirements of the Good Samaritan doctrine are met.

A. THE NINTH CIRCUIT'S REFERENCE TO THE LIABILITY OF STATE GOVERNMENTAL ENTITIES, WITHOUT REGARD TO THE LIABILITY OF A PRIVATE PERSON UNDER LIKE CIRCUMSTANCES, IS FUNDAMENTALLY INCONSISTENT WITH THE FTCA

The court of appeals concluded that "there is no private-sector analogue for mine inspections because private parties 'do not wield [regulatory] power' * * * to conduct such 'unique governmental functions.'" Pet. App. 5a-6a (citations omitted; alteration by court of appeals). It reasoned that "[t]he question thus becomes whether, under Arizona law, state and municipal entities would be liable under like circumstances." *Id.* at 6a. Concluding that "[t]he answer is yes," the court of appeals held that the United States could be

liable under the FTCA, without regard to whether a private person would be liable. Respondents' attempt to defend that decision does not withstand scrutiny.

1. As an initial matter, respondents devote a considerable portion of their brief to refuting a position that the United States does not advance: "that sovereign immunity still protects the United States from liability when its employees conduct activities that private persons do not perform." Resp. Br. 2 (citing U.S. Br. 23); see *id.* at 6-10. As our opening brief explains (U.S. Br. 15), the FTCA's reference to the liability of a private person does not mean that the FTCA applies only to conduct that private persons in fact perform. See *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). Rather, as the text of the statute instructs, see 28 U.S.C. 1346(b)(1), 2674, the FTCA requires reference to the liability principles of private persons in "like," not "the same," circumstances. See *Indian Towing*, 350 U.S. at 64. In the circumstances of this case, the United States concedes (U.S. Br. 32) that there are private persons in "like circumstances"—private persons who conduct safety inspections. The United States seeks nothing more here than a straightforward application of the plain text of the FTCA.[1]

2. Respondents argue that the Ninth Circuit's approach is necessary to fill a "gap" in the FTCA with respect to conduct that private persons do not regularly perform. Resp. Br. 3, 10. Thus, respondents contend (*e.g.*, *id.* at 10-11) that "when the most analogous circumstances involve conduct generally performed by state actors, the proper analysis

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[1] The point of the discussion on page 23 of our opening brief, cited by respondents (Resp. Br. 2), is that in a case, unlike this one, in which there is no private person in like circumstances, the consequence dictated by the text of the FTCA is that the United States is not liable, see *Feres* v. *United States*, 340 U.S. 135, 141 (1950), not that the court should launch into a search for a non-private entity that might face liability in like circumstances.

under the FTCA is to look to state law that applies to that *state actor*." *Id.* at 15 (emphasis added).

Such an approach flies directly in the face of the plain text of the FTCA. The FTCA does not make the United States liable to the same extent as the "most analogous" actor under state law. See Resp. Br. 15. Rather, it limits the United States' potential tort liability to that of a "*private individual* under like circumstances." 28 U.S.C. 2674 (emphasis added); see 28 U.S.C. 1346(b)(1). Given this clear textual limitation, the Court has long recognized that private-person liability is the touchstone for assessing the United States' potential FTCA liability. See *Indian Towing*, 350 U.S. at 64-65; *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318-319 (1957); *United States* v. *Muniz*, 374 U.S. 150, 164 (1963); *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004). In so doing, the Court expressly has rejected reference to State or municipal liability, even in the face of more closely analogous state actors. See, *e.g.*, *Rayonier*, 352 U.S. at 318-319 (rejecting reference to public firefighters in case involving federal firefighters).

Therefore, contrary to respondents' argument (Resp. Br. 10), the "private person" in "like circumstances" test in the FTCA does not give rise to a "gap" that courts are free to fill with some other standard. Here, there is no "gap" because private parties' liability in like circumstances is governed by the Good Samaritan doctrine. Moreover, to the extent that there are "gaps" in Congress's waiver of the United States' sovereign immunity, the courts are not free to fill the gap by extending the waiver beyond the bounds established by Congress. *Smith* v. *United States*, 507 U.S. 197, 203 (1993).

3. Respondents appear to recognize the flaw in the court of appeals' approach, expressly acknowledging that looking to the liability of a state actor would be inconsistent with the FTCA if it "subject[ed] the United States to greater liability

than that of a private person." Resp. Br. 3; see *id.* at 16. Respondents argue, however, that the court of appeals' decision does not have that effect, contending that, under Arizona law, "government actors are treated like private persons for tort liability purposes." *Id.* at 4 (citing *Ryan* v. *State*, 656 P.2d 597, 5.) (Ariz. 1982)). But the Ninth Circuit did not base its decision on any such notion. Quite to the contrary, it concluded that private persons in Arizona could *not* be liable for the type of inspection activity at issue here "because private persons do not wield regulatory power." Pet. App. 5a-6a (brackets and internal quotation marks omitted). That is why the court of appeals looked to the liability of state governmental entities. *Ibid.* And it relied solely on an Arizona case holding that "a state governmental entity, including a state mine inspector, may be held liable under Arizona law for the failure to perform mandatory safety inspections." *Id.* at 6a (citing *Diaz* v. *Magma Copper Co.*, 950 P.2d 1165 (Ariz. Ct. App. 1997)).

Like the court of appeals, respondents rely, as they concede, only upon cases in which the "defendants * * * were governmental entities." Resp. Br. 18. Respondents point to no case in which an Arizona court has held a private person liable for a negligent inspection without first analyzing whether the private person owed the injured third party a duty under private tort law, specifically, the Good Samaritan doctrine. See *id.* at 17-19. That is unsurprising, inasmuch as the statutes upon which Arizona courts have relied to find that state and local governmental entities owe third parties a duty to conduct inspections with reasonable care impose a duty only upon state and local governmental actors, not private persons. See, *e.g.*, *De La Cruz* v. *State*, 961 P.2d 1070, 1072 (Ariz. Ct. App. 1998) (holding that Arizona's occupational safety and health statute imposed an actionable duty on the State to conduct worksite inspections with reasonable care);

Daggett v. *County of Maricopa*, 770 P.2d 384, 386-389 (Ariz. Ct. App. 1989) (holding that state and county regulations requiring a County's Health Department to inspect swimming pools imposed an actionable duty upon the County to inspect facilities with reasonable care).[2] Contrary to respondents' suggestion (see Resp. Br. 15-17, 19), *Ryan* v. *State* does not support application of those cases to safety inspections performed by private persons. *Ryan* rejected the public duty doctrine, thereby generally rendering the State liable for failure to perform, or negligence in the performance of, statutory duties, even where the State would previously have enjoyed a defense that the duty was owed to the public at large, rather than to the specific individual injured. 656 P.2d at 599. *Ryan* did not hold that the substantive duties—and resulting liabilities—of state entities and actors are themselves necessarily the same as those of private persons. State regulatory statutes, such as those requiring specified entities to conduct inspections of private goods or premises, almost invariably apply only to government agencies.

4. In any event, this case does not present the "gap" in the FTCA posited by respondents, as there is a private-person analog within the meaning of the statute. As noted above, the measure of the United States' potential liability is not "a private individual 'under the *same* circumstances,'" it is a private individual engaging in activities of the same "character." *Indian Towing Co.*, 350 U.S. at 64-67 (emphasis

[2] Tellingly, the court in *Daggett* rejected the plaintiff's alternative contention that the County was liable under Section 324A of the Restatement (Second) of Torts (1965), which embodies the Good Samaritan doctrine (see pp. 18-19, *infra*) and governs the liability of private inspectors in Arizona (see p. 7, *infra*). See 770 P.2d at 389-390 (holding that the requirements for liability under Section 324A had not been satisfied). *Daggett* thus underscores that under Arizona law, the liability for governmental inspectors is broader than that of private inspectors.

added). Thus, in *Indian Towing*, the Court held that the question under the FTCA was not whether a private individual would be liable in tort specifically for operating lighthouses (which private persons were not then authorized to do, *id.* at 66-67), but whether a private individual "who undertakes to warn the public of danger and thereby induces reliance" would be liable if he failed to "perform his 'good Samaritan' task in a careful manner." *Id.* at 64-65.

Similarly here, there is a private-person analog to the inspections by the Mine Safety and Health Administration (MSHA): inspections conducted by a private person of property owned by another person. Under Arizona law, a private person may be liable for negligent performance of an inspection that causes injury to a third person, but only if the requirements of the Good Samaritan doctrine set forth in Sections 323 and 324A of the Restatement (Second) of Torts (1965) establish a duty of the private inspector to the injured third party. See *Easter* v. *Percy*, 810 P.2d 1053, 1056-1057 (Ariz. Ct. App. 1991) (claim against consulting engineers for negligent inspection and supervision of construction project); *Papastathis* v. *Beall*, 723 P.2d 97, 100 (Ariz. Ct. App. 1986) (claim that private company negligently inspected and selected defective beverage rack).[3]

[3] Respondents contend, without any supporting citations (Resp. Br. 29), that the proper comparison to a private person "under like circumstances" in the context of this case would be a private person who is *required* to conduct inspections. The United States, however, is not required by Arizona law to conduct inspections, and, by virtue of the Supremacy Clause, it could not be required by state law to do so. See, *e.g.*, *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976); *Mayo* v. *United States*, 319 U.S. 441, 445 (1920). Insofar as Arizona law is concerned, the United States has voluntarily adopted an inspection program, and any "duties" that program imposes on federal inspectors are owed not to private parties (mine operators or miners), but to the Secretary of Labor, in order to assist the Secretary in ensuring compliance with federal law. The Good Samaritan doctrine therefore is the proper framework for analyzing

The difference between the Good Samaritan doctrine and the Ninth Circuit's approach is crucial. For state and local governmental inspectors, Arizona's statutory and regulatory provisions requiring inspections or requiring due care in the conduct of inspections, standing alone, have been held to create an actionable duty, enforceable in tort, owed by the state or local governmental entity to third persons whose safety may be advanced by the inspections. See *De La Cruz*, 961 P.2d at 1072-1073.[4] In contrast to the statutorily prescribed duties owed to third parties by state and local regulatory agencies under Arizona law, private persons owe a tort duty to third persons under Arizona law only if the requirements of the Good Samaritan doctrine are met. See *Papastathis*, 723 P.2d at 100; Restatement (Second) of Torts, *supra*, §§ 323, 324A; see also pp. 18-20, *infra*. The Ninth Circuit's approach thus subjects the United States to liability in situations where a private person would not be liable, which—as respondents acknowledge (Resp. Br. 3, 16)—is impermissible under the FTCA.

B. FTCA LIABILITY CANNOT BE FOUNDED SOLELY ON THE PROVISIONS OF THE FEDERAL MINE ACT AND FEDERAL REGULATIONS AND POLICIES

Respondents suggest that the FTCA makes the United States liable whenever "the United States negligently performs its statutory and regulatory duties." Resp. Br. 19. None of respondents' rationales for that sweeping proposition withstands scrutiny. *Id.* at 19-28.

1. Under the plain terms of the FTCA, the United States can be liable only if a private person would be held liable for similar conduct under the relevant *state* law. See U.S. Br. 27-28 (discussing *FDIC* v. *Meyer*, 510 U.S. 471, 478 (1994)). Respondents do not address *FDIC* v. *Meyer*, but instead once again answer an argument that the United States is not making. See Resp. Br. 19-23. The United States does *not* contend that any conduct by federal employees taken pursuant to their statutory and regulatory obligations is beyond the purview of the FTCA. See *id.* at 19 ("The United States attempts to immunize itself from liability in the performance of its statutes and regulations."). Our point is that federal laws or regulations that purportedly place obligations only on federal employees cannot in and of themselves create FTCA liability in the absence of state law imposing liability on similarly-situated private persons.

As the opening brief makes clear (U.S. Br. 26-30), courts repeatedly have recognized this fundamental limitation on the United States' FTCA liability. See, *e.g.*, *Johnson* v. *Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995) (en banc) (holding that "the violation of a federal statute or regulation does not give rise to FTCA liability unless the relationship between the offending federal employee or agency and the injured party is such that the former, if a private person or entity, would owe a duty under state law to the latter in a *nonfederal* context"); *Ayala* v. *United States*, 49 F.3d 607, 610 (10th Cir. 1995) (holding, with respect to federal mine inspectors, that "[e]ven if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons").

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the potential liability of the United States in this case, although as explained at pp. 18-20, *infra*, that doctrine furnishes no basis for imposing state tort liability on the United States here. Whether state statutory, contract, or common law imposes any requirements on private parties to conduct inspections in certain circumstances (see Resp. Br. 29) therefore is irrelevant.

[4] In that respect, Arizona law is wholly different from the Federal Mine Safety and Health Act (Mine Act or Act), 30 U.S.C. 801 *et seq.*, which creates no such duty owed to individual miners, much less a cause of action for damages for violation of any such duties. See pp. 14-15, 17-18, *infra*.

Respondents attempt to distinguish the many decisions declining to base FTCA liability solely upon obligations of federal employees under federal law, suggesting that those decisions turned upon the absence of evidence that the state in question would conclude that the relevant federal law imposed an actionable duty upon private persons. See Resp. Br. 24-25 (citing *Delta Sav. Bank* v. *United States*, 265 F.3d 1017, 1026 (9th Cir. 2001)). But the same is true here. As explained below (see Point B.3, *infra*), there is no basis for believing that Arizona would (or indeed could) impose an actionable duty of care upon private persons to perform the *United States'* regulatory responsibilities under the federal Mine Act. In fact, *Delta Savings* supports this point. *Delta Sav.*, 265 F.3d at 1026 ("To bring suit under the FTCA based on negligence per se, a duty must be identified, and this duty cannot spring from a federal law. The duty must arise from state statutory or decisional law, and must impose on the defendants a duty to refrain from committing the sort of wrong alleged here.").

2. Respondents also contend (Resp. Br. 21-23) that the "due care" and "discretionary function" exceptions to FTCA liability demonstrate that the United States is liable whenever its employees negligently perform mandatory statutory and regulatory duties. See 28 U.S.C. 2680(a) (providing a defense to "[a]ny claim based upon an act or omission of an employee * * * exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid," or "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty"). That fundamentally misconceives the nature of the FTCA exceptions. Section 2680(a) does not impose liability. To the contrary, it further limits the FTCA's waiver of sovereign immunity by precluding liability on the part of the United States in certain circumstances *even if* a private

person would be liable. To read the exceptions as creating liability by negative inference, as respondents do (Resp. Br. 21, 23), would impermissibly expand the FTCA's waiver of sovereign immunity well beyond the bounds established by Congress. *Smith*, 507 U.S. at 203.

None of the cases cited by respondents (Resp. Br. 22, 23) supports the view that federal obligations can alone create a basis for FTCA liability. See 28 U.S.C. 1346(b)(1), 2674. For example, *United States* v. *Muniz*, 374 U.S. 150 (1963), reiterated the principle of *Indian Towing*—that the United States' FTCA liability must be judged by reference to the liability of a private person in like circumstances. *Muniz*, 374 U.S. at 164. The statement from *Muniz* upon which respondents rely (Resp. Br. 22) suggests only that, *if* a private person in like circumstances would owe an actionable tort duty under state law, the substance of federal law may be the best source in some circumstances for determining whether the federal employee was in fact negligent—*i.e.*, whether the federal employee breached the standard of care. See 374 U.S. at 164-165 (stating that relevant "duty of care" for claim of negligence against federal prison officers is fixed by a federal statute).[5] The other cases cited by respondents (Resp. Br. 22, 23) simply involve straightforward applications of the FTCA's "due care" and "discretionary function" exceptions; none of the cases suggests that liability can be based on conduct that would not subject a private person to liability under state law,

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[5] See, *e.g.*, *Lutz* v. *United States*, 685 F.2d 1178, 1184 (9th Cir. 1982) ("The federal statute or regulation under which the employee acted only becomes pertinent when a state law duty is found to exist. The federal statute or regulation may then provide the standard for reasonable care in exercising the state law duty."); cf. *Rhoden* v. *United States*, 55 F.3d 428, 430-431 (9th Cir. 1995) (federal law is relevant to the question of whether detention by an INS officer was legally privileged, where state law defines false imprisonment as nonconsensual confinement without lawful privilege).

whether because of the absence of any actionable duty or for other reasons.[6]

3. Respondents next contend that the United States can be held liable in this case under Arizona's "negligence per se" doctrine. See Resp. Br. 24-28. Respondents are incorrect.

a. Respondents' argument proceeds at such a high level of generality and abstraction that, if accepted, it would render virtually meaningless the FTCA's limitations on the United States' waiver of its sovereign immunity. Respondents appear to argue (*e.g.*, Resp. Br. 25) that, because Arizona law sometimes applies a theory of negligence per se to private persons and may look to federal statutes and regulations to create both a duty and a standard of care on the part of private persons in some situations, the United States ipso facto can be liable under a negligence per se theory for failure to follow *any* federal statute or regulation, even when the

[6] See *Hatahley* v. *United States*, 351 U.S. 173, 180-181 (1956) (recognizing that federal employees' destruction of plaintiffs' horses would state a willful tort claim against private persons under state law, and rejecting government's "due care" and "discretionary function" defenses); *Dupree* v. *United States*, 247 F.2d 819, 824-825 (3d Cir. 1957) (recognizing that FTCA claim must be grounded in state law, but rejecting claim because government employee's conduct was protected by "due care" exception); *Donohue* v. *United States*, 437 F. Supp. 836, 840-841 (E.D. Mich. 1977) (recognizing that allegations of injury to plaintiff's business reputation and earning ability stated valid claim under state law, and concluding that disputed facts existed regarding government's asserted "due care" and "discretionary function" defenses); see also *United States* v. *Gaubert*, 499 U.S. 315, 322-334 (1991) (interpreting discretionary function exception); *Berkovitz* v. *United States*, 486 U.S. 531, 535 & n.2 (1988) (same); *Phillips* v. *United States*, 956 F.2d 1071, 1074-1077, 1078 (11th Cir. 1992) (same). And *Hines* v. *United States* cannot aid respondents, as the Ninth Circuit in that case made the same legal error challenged here. See 60 F.3d 1442, 1448-1449 (9th Cir. 1995) (imposing duty upon the United States for alleged failure to follow mandatory postal regulations because California would subject its own public entities to similar liability). Indeed, the decision below relied on *Hines*. Pet. App. 5a-6a.

federal statute or regulation applies only to federal agencies and employees and imposes *no* duty or standard of care on a private person. But the FTCA provides no warrant for conjuring from general negligence per se principles under state law a novel tort duty that would apply only to the United States and not to a private person. That would read the "private individual under like circumstances" limitation out of the FTCA. If that argument were valid, it would follow that, as long as state law applies a general negligence theory of liability to private persons, the United States could be held liable for *any* negligence by its employees in the performance of their jobs, regardless of the circumstances.[7] The appropriate level of generality is neither negligence law in the abstract, nor the obligations placed only on federal mine inspectors by federal law, but the duties imposed on private persons under the Good Samaritan doctrine. Cf. *Indian Towing*, 350 U.S. at 64-65, 69.

The circuit court cases cited by respondents (Resp. Br. 24) do not support respondents' sweeping negligence per se theory. For example, like the cases relied upon by the United States (U.S. Br. 26-30), *Cecile Industries, Inc.* v. *United States*, 793 F.2d 97 (3d Cir. 1986), held that a State's negligence per se doctrine did *not* provide a basis for liability under the FTCA where the conduct at issue would not give rise to a claim against a private person under state law. *Id.* at 100. In *In re Sabin Oral Polio Vaccine Products Liability*

[7] Respondents' reliance (Resp. Br. 14-15) on a supposed concession by the United States misconstrues the point in our opening brief. In referring to "broader principles of state law that encompass actions by private individuals as well" as potentially providing special privileges or prerogatives to law enforcement officers, see U.S. Br. 24-25 n.7, the United States was referring to principles of state law that would apply to private individuals *under like circumstances*, not principles that merely apply to private individuals in the abstract or in dissimilar circumstances.

Litigation, the district court engaged in the type of analysis that the Ninth Circuit should have—it looked to state-law Good Samaritan principles applicable to private persons in determining whether the United States owed a duty to the plaintiffs. See 774 F. Supp. 952, 954 (D. Md. 1991) ("[T]he [federal] regulations, standing by themselves, do not give rise to any legal duty under the FTCA."); see also *id.* at 953 n.3. The court then looked to the federal regulations only to determine whether the duty of care it identified had been breached—*i.e.*, to determine the standard of care. *Id.* at 955-957. In the appellate decision in that case, cited by respondents, the Fourth Circuit similarly looked to federal regulations solely to establish the applicable standard of care, not to impose a duty in the first place. See *In re Sabin Oral Polio Vaccine Prods. Liability Litig.*, 984 F.2d 124, 127-128 (4th Cir. 1993) (per curiam); see also note 5, *supra*.

In *Moody* v. *United States*, 774 F.2d 150 (1985), the Sixth Circuit did state that "since under Tennessee law a private individual could be held liable for violation of a federal regulation, the United States under the FTCA is exposed to similar liability." *Id.* at 157. Whatever the Sixth Circuit intended by that general statement, it proceeded to hold that the United States could not be liable based on the federal regulations at issue, which it concluded "inherently limit[ed] the scope" of the United States' duties and in particular imposed no duties running to the plaintiffs. *Id.* at 157-158. In any event, the Sixth Circuit later rejected application of a negligence per se theory to establish liability under the FTCA in the precise context presented here: alleged violation by MSHA inspectors of the obligations imposed on them by the Mine Act and implementing regulations. *Myers* v. *United States*, 17 F.3d 890, 899 (6th Cir. 1994). The *Myers* court pointed out that the regulations directing the actions of federal mine inspectors merely establish a means of monitoring compliance by mine operators, and any "duties" they impose on inspectors "run only to the Secretary of Labor, not to the miners." *Id.* at 900 (citing *Zabala Clemente* v. *United States*, 567 F.2d 1140, 1144-1145 (1st Cir. 1977) (same as to FAA inspectors), cert. denied, 435 U.S. 1006 (1978)); see *Town of Castle Rock* v. *Gonzales*, 125 S. Ct. 2796, 2808 (2005) ("Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people."). The court further observed in *Myers* that it is improper to use the negligence per se doctrine as a means of "making the government liable as an insurer for every private party's violation of a federal regulatory scheme," where Congress has refused to create an express cause of action for the government's failure to perform a particular regulatory function under that scheme. 17 F.3d at 901. To do so, the court reasoned, "would, in effect, be permitting a private cause of action under the Act." *Ibid.*

Similarly, to the extent that *Gill* v. *United States*, 429 F.2d 1072, 1075 (5th Cir. 1970), may be read to locate a state-law duty in a federal statute directed only to a federal agency, it was clearly superseded by the Fifth Circuit's en banc decision in *Johnson*. There, the Fifth Circuit held that "the FTCA requires that the duty breached by the government employees be not simply one imposed by federal statute or regulation, but rather arise under state law." *Johnson*, 47 F.3d at 737; see *id.* at 728 (describing *Gill* as a case in which the Fifth Circuit analyzed the United States' duty under the "local law good Samaritan rule").

b. Accordingly, it is not enough, as respondents suggest (Resp. Br. 26-28), simply to ask whether the federal Mine Act was enacted at least in part to promote the safety of miners and whether the federal mine inspectors violated certain provisions of the statute or relevant regulations directing their conduct. In order to determine whether the United

States could be held liable for such a violation, the FTCA demands an inquiry into the liability of private persons in like circumstances, and the Good Samaritan doctrine provides the answer to that inquiry.

Respondents cite (Resp. Br. 25, 28) *Martin* v. *Schroeder*, 105 P.3d 577 (Ariz. Ct. App. 2005), for the proposition that under Arizona's negligence per se doctrine, state law may look to federal law to provide both a source of a duty and a standard of care, and argue that the federal Mine Act should be given the same effect here. Respondents' reliance on *Martin* is misplaced. The provision of the federal gun control statute that barred the delivery of a firearm to an unlawful user of or person addicted to a controlled substance, 18 U.S.C. 922(d)(3), at issue in *Martin*, directly proscribed conduct by private persons. See 105 P.3d at 582-584. As such, the state court concluded that the gun control statute could provide a basis for a negligence per se claim against parents who allegedly provided a gun to their son, a marijuana user, because the plaintiff claimed that their conduct directly contravened the terms of a statute that applied to them. *Id.* at 582-584.

Whatever other objections there may be to holding the United States liable through the FTCA for violations of federal statutes by federal employees based on a state decision like *Martin*, this case differs from *Martin* in a fundamental respect. In contrast to *Martin*, this is not a case in which the relevant provisions of federal law impose duties on private persons, which could then, by extension, be made the source of state tort duties applicable to the federal government under the FTCA. The provisions of the federal Mine Act relied upon by respondents require only federal employees, not private persons, to perform inspections. See 30 U.S.C. 813. As such, no private person could violate those provisions of the Mine Act. Accordingly, by virtue of the

"private individual under like circumstances" test in the FTCA, the Mine Act cannot—either directly or via *Martin*—be the source of a duty and resulting liability of the United States under the FTCA.[8]

4. Basing an FTCA claim solely on obligations purportedly required of federal employees under the Mine Act would be inconsistent not only with the plain language of the FTCA, but also with the Mine Act. The Mine Act expressly states that primary responsibility for the safety of miners remains with the mine operators and the miners. See 30 U.S.C. 801(e) (providing that "the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines"). As the Sixth Circuit has explained, any duty imposed upon federal inspectors under the Mine Act "run[s] only to the Secretary of Labor, not to the miners." *Myers*, 17 F.3d at 900. Nevertheless, and despite the Mine Act's express disclaimer, the Ninth Circuit adopted an approach that essentially would render the United States directly responsible for the safety of particular individual miners, without regard to whether a private person would owe a duty in similar circumstances under state law.

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[8] Moreover, a negligence per se action would not lie against a private person even as a matter of state law in these circumstances, because, under Arizona law, if the tort defendant has not violated the relevant statute, the statute cannot be the basis of a negligence per se claim. See *Thompson* v. *Sun City Community Hospital, Inc.*, 688 P.2d 647, 656 (Ariz. Ct. App. 1983) (holding that negligence per se doctrine was inapplicable because the federal statute did not apply to the defendant), rev'd on other grounds, 688 P.2d 605 (Ariz. 1984); *Bloxham* v. *Glock Inc.*, 53 P.3d 196, 202 (Ariz. Ct. App. 2002) (rejecting application of negligence per se because plaintiffs did not allege that the defendants had violated the law); *Bell* v. *Smitty's Super Valu, Inc.*, 900 P.2d 15, 16-17 (Ariz. Ct. App. 1995) (rejecting negligence per se claim because defendant's conduct did not violate the terms of the relevant statute).

Such a result cannot be squared with the Mine Act any more than it can be with the FTCA.

In short, there is no basis for assessing the United States' tort liability in the present case under any standard other than the Good Samaritan doctrine.

C. IF THE COURT REACHES THE ISSUE, THE REQUIREMENTS OF THE GOOD SAMARITAN DOCTRINE WERE NOT SATISFIED IN THE PRESENT CASE

Because the Ninth Circuit applied Arizona law applicable to governmental entities rather than the law applicable to private persons, it did not evaluate whether the United States would be liable under Arizona's Good Samaritan doctrine. It therefore would be appropriate to remand to the court of appeals to address that question in the first instance. Respondents contend that if the Court does address that question, it should find that the United States would be liable under the Good Samaritan doctrine as incorporated in Arizona law. Resp. Br. 31-33. To the contrary, in that event, the Court should affirm the district court's conclusion that respondents "have failed to state a viable negligent inspection claim under the Restatement." Pet. App. 23a-24a.

In this Court, respondents rely solely on Section 324A(c) of the Restatement (Second) of Torts (1965) for their contention that the United States owed a Good Samaritan duty to the miners. Under that subsection:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if * * *

> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id. § 324A(c). See *Papastathis*, 723 P.2d at 100; *Easter*, 810 P.2d at 1056 (quoting Restatement). Respondents base their contention on barebones declarations from Mr. Olson and Mr. Vargas attesting that each relied upon MSHA "to inspect the ASARCO Mine with the goal of making the mine a safe place for me and other miners to work" and assumed "that the inspectors had expertise and would use it to exercise reasonable safety practices." J.A. 98-99.

Given that the Mine Act expressly states that "the operators of * * * mines with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe] conditions and practices in such mines," 30 U.S.C. 801(e)—and that federal inspections are enforcement measures designed to ensure compliance by mine operators and miners—the United States cannot be said to have "undertake[n] * * * to render services" to either the mine operator or the miners, a necessary predicate to Good Samaritan liability. See Restatement, *supra*, §§ 323, 324A. Moreover, "[i]n light of the clear Congressional purpose to ensure that the primary responsibility for safety remains with the mine owners and miners, 30 U.S.C. § 801(e), [any] reliance —even had it occurred—would have been manifestly unreasonable and unjustified." *Myers*, 17 F.3d at 904; accord *Raymer* v. *United States*, 660 F.2d 1136, 1143 (6th Cir. 1981).[9]

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[9] For these reasons, respondents' citation (Resp. Br. 32-33) to an illustration in the Restatement concerning an elevator inspection misses the mark. See Restatement, *supra*, § 324A cmt. e, illus. 4. In that illustration, the building owner employed the inspector to perform inspection services for the owner. Here, by contrast, the inspections at issue are part of the regulatory and enforcement responsibilities of the government, not services rendered to the mine operator. Moreover, in light of the primary responsibility of the mine

In any event, respondents' declarations are wholly inadequate to establish the requisite element of reliance under the Restatement and Arizona law. Neither respondent claims or even suggests that he relied on any specific conduct by inspectors related to the supposedly unsafe conditions or practices in the area where their injuries occurred. Neither claims that he was unaware of the hazards that resulted in his injuries. Furthermore, neither claims that he failed to take necessary precautions or avail himself of other remedies because of MSHA's inspection activities. But as the Restatement explains, the accident could not truly be said to have resulted from MSHA's conduct—and the respondents' reliance thereon—unless the miners were "induced * * * to forgo other remedies or precautions." Restatement, *supra*, § 324A cmt. e; accord *Myers*, 17 F.3d at 903; *Tollenaar* v. *Chino Valley Sch. Dist.*, 945 P.2d 1310, 1312 (Ariz. Ct. App. 1997) (relying upon lack of evidence that plaintiffs "forewent other precautions in reliance" upon defendant's actions); see also *Dorking Genetics* v. *United States*, 76 F.3d 1261, 1268 (2d Cir. 1996) (holding that conclusory assertions of reliance were insufficient where plaintiff did not show "that it took, or declined to take, any action in reliance on the United States' performance of its duty").

* * * * *

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

AUGUST 2005

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operator, Asarco Mining Company, for ensuring the safety of its miners, any reliance by Asarco (or the miners) on MSHA's inspection activities to ensure the safety of the mine would have been unreasonable. See pp. 14-15, 19, *supra*.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* OLSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–759. Argued October 12, 2005—Decided November 8, 2005

Claiming that federal mine inspectors' negligence helped cause a mine accident, two injured workers (and a spouse) sued the United States under the Federal Tort Claims Act (FTCA or Act), which authorizes private tort actions against the Government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U. S. C. §1346(b)(1). The District Court dismissed in part on the ground that the allegations did not show that Arizona law would impose liability upon a private person in similar circumstances. The Ninth Circuit reversed, reasoning from two premises: (1) Where unique governmental functions are at issue, the Act waives sovereign immunity if a state or municipal entity would be held liable under the law where the activity occurred, and (2) federal mine inspections are such unique governmental functions since there is no private-sector analogue for mine inspections. Because Arizona law would make a state or municipal entity liable in the circumstances alleged, the Circuit concluded that the United States' sovereign immunity was waived.

Held: Under §1346(b)(1), the United States waives sovereign immunity only where local law would make a "private person" liable in tort, not where local law would make "a state or municipal entity" liable. Pp. 2–5.

(a) The Ninth Circuit's first premise is too broad, reading into the Act something that is not there. Section 1346(b)(1) says that it waives sovereign immunity "under circumstances where the United States, if a *private person*," not "the United States, if a state or municipal entity," would be liable. (Emphasis added.) This Court has consistently adhered to this "private person" standard, even when

uniquely governmental functions are at issue. *Indian Towing Co.* v. *United States*, 350 U. S. 61, 64; *Rayonier Inc.* v. *United States*, 352 U. S. 315, 318. Even though both these cases involved Government efforts to *escape* liability by pointing to the *absence* of municipal entity liability, there is no reason for treating differently a plaintiff's effort to *base* liability solely upon the fact that a State would impose liability upon a state governmental entity. Nothing in the Act's context, history, or objectives or in this Court's opinions suggests otherwise. Pp. 2–3.

(b) The Ninth Circuit's second premise reads the Act too narrowly. Section 2674 makes the United States liable "in the same manner and to the same extent as a private individual under *like circumstances*." (Emphasis added.) The words "like circumstances" do not restrict a court's inquiry to the *same circumstances*, but require it to look further afield. See, *e.g.*, *Indian Towing*, *supra*, at 64. The Government in effect concedes, and other Courts of Appeals' decisions applying *Indian Towing*'s logic suggest, that private person analogies exist for the federal mine inspectors' conduct at issue. The Ninth Circuit should have looked for a such an analogy. Pp. 3–4.

(c) The lower courts should decide in the first instance precisely which Arizona tort law doctrine applies here. P. 5.

362 F. 3d 1236, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–759

UNITED STATES, PETITIONER *v.* JOSEPH OLSON ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[November 8, 2005]

JUSTICE BREYER delivered the opinion of the Court.

The Federal Tort Claims Act (FTCA or Act) authorizes private tort actions against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. §1346(b)(1). We here interpret these words to mean what they say, namely, that the United States waives sovereign immunity "under circumstances" where local law would make a "*private person*" liable in tort. (Emphasis added.) And we reverse a line of Ninth Circuit precedent permitting courts in certain circumstances to base a waiver simply upon a finding that local law would make a "state or municipal entit[y]" liable. See, *e.g.*, *Hines* v. *United States*, 60 F. 3d 1442, 1448 (1995); *Cimo* v. *INS*, 16 F. 3d 1039, 1041 (1994); *Cameron* v. *Janssen Bros. Nurseries, Ltd.*, 7 F. 3d 821, 825 (1993); *Aguilar* v. *United States*, 920 F. 2d 1475, 1477 (1990); *Doggett* v. *United States*, 875 F. 2d 684, 689 (1988).

I

In this case, two injured mine workers (and a spouse)

have sued the United States claiming that the negligence of federal mine inspectors helped bring about a serious accident at an Arizona mine. The Federal District Court dismissed the lawsuit in part upon the ground that their allegations were insufficient to show that Arizona law would impose liability upon a private person in similar circumstances. The Ninth Circuit, in a brief *per curiam* opinion, reversed this determination. It reasoned from two premises. First, where "'unique governmental functions'" are at issue, the Act waives sovereign immunity if "'a state or municipal entity would be [subject to liability] under the law [. . .] where the activity occurred.'" 362 F. 3d 1236, 1240 (2004) (citing *Hines*, *supra*, at 1448, and quoting *Doggett*, *supra*, at 689, and *Concrete Tie of San Diego, Inc.* v. *Liberty Constr., Inc.*, 107 F. 3d 1368, 1371 (CA9 1997)). Second, federal mine inspections being regulatory in nature are such "'unique governmental functions,'" since "there is no private-sector analogue for mine inspections." 362 F. 3d, at 1240 (quoting in part *Doggett*, *supra*, at 689). The Circuit then held that Arizona law would make "state or municipal entities" liable in the circumstances alleged; hence the FTCA waives the United States' sovereign immunity. 362 F. 3d, at 1240.

II

We disagree with both of the Ninth Circuit's legal premises.

A

The first premise is too broad, for it reads into the Act something that is not there. The Act says that it waives sovereign immunity "under circumstances where the United States, if a *private person*," not "the United States, if a state or municipal entity," would be liable. 28 U. S. C. §1346(b)(1) (emphasis added). Our cases have consistently adhered to this "private person" standard. In *Indian*

Towing Co. v. *United States*, 350 U. S. 61, 64 (1955), this Court rejected the Government's contention that there was "no liability for negligent performance of 'uniquely governmental functions.'" It held that the Act requires a court to look to the state-law liability of private entities, not to that of public entities, when assessing the Government's liability under the FTCA "in the performance of activities which private persons do not perform." *Ibid.* In *Rayonier Inc.* v. *United States*, 352 U. S. 315, 318–319 (1957), the Court rejected a claim that the scope of FTCA liability for "'uniquely governmental'" functions depends on whether state law "imposes liability on municipal or other local governments for the negligence of their agents acting in" similar circumstances. And even though both these cases involved Government efforts to *escape* liability by pointing to the *absence* of municipal entity liability, we are unaware of any reason for treating differently a plaintiff's effort to *base* liability solely upon the fact that a State would impose liability upon a municipal (or other state governmental) entity. Indeed, we have found nothing in the Act's context, history, or objectives or in the opinions of this Court suggesting a waiver of sovereign immunity solely upon that basis.

B

The Ninth Circuit's second premise rests upon a reading of the Act that is too narrow. The Act makes the United States liable "in the same manner and to the same extent as a private individual under *like circumstances*." 28 U. S. C. §2674 (emphasis added). As this Court said in *Indian Towing*, the words "'like circumstances'" do not restrict a court's inquiry to the *same circumstances*, but require it to look further afield. 350 U. S., at 64; see also S. Rep. No. 1400, 79th Cong., 2d Sess., 32 (1946) (purpose of FTCA was to make the tort liability of the United States "the same as that of a private person under like circum-

stance, in accordance with the local law"). The Court there considered a claim that the Coast Guard, responsible for operating a lighthouse, had failed "to check" the light's "battery and sun relay system," had failed "to make a proper examination" of outside "connections," had "fail[ed] to check the light" on a regular basis, and had failed to "repair the light or give warning that the light was not operating." *Indian Towing*, 350 U. S., at 62. These allegations, the Court held, were analogous to allegations of negligence by a private person "who undertakes to warn the public of danger and thereby induces reliance." *Id.*, at 64–65. It is "hornbook tort law," the Court added, that such a person "must perform his 'good Samaritan' task in a careful manner." *Ibid.*

The Government in effect concedes that similar "good Samaritan" analogies exist for the conduct at issue here. It says that "there are private persons in 'like circumstances'" to federal mine inspectors, namely "private persons who conduct safety inspections." Reply Brief for United States 3. And other Courts of Appeals have found ready private person analogies for Government tasks of this kind in FTCA cases. *E.g.*, *Dorking Genetics* v. *United States*, 76 F. 3d 1261 (CA2 1996) (inspection of cattle); *Florida Auto Auction of Orlando, Inc.* v. *United States*, 74 F. 3d 498 (CA4 1996) (inspection of automobile titles); *Ayala* v. *United States*, 49 F. 3d 607 (CA10 1995) (mine inspections); *Myers* v. *United States*, 17 F. 3d 890 (CA6 1994) (same); *Howell* v. *United States*, 932 F. 2d 915 (CA11 1991) (inspection of airplanes). These cases all properly apply the logic of *Indian Towing*. Private individuals, who do not operate lighthouses, nonetheless may create a relationship with third parties that is similar to the relationship between a lighthouse operator and a ship dependent on the lighthouse's beacon. *Indian Towing*, *supra*, at 64–65, 69. The Ninth Circuit should have looked for a similar analogy in this case.

III

Despite the Government's concession that a private person analogy exists in this case, the parties disagree about precisely which Arizona tort law doctrine applies here. We remand the case so that the lower courts can decide this matter in the first instance. The judgment of the Ninth Circuit is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.